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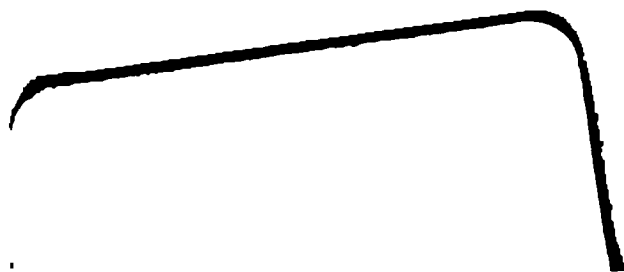


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NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1837.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. XI.

LONDON.
1872.

I N D E X
OF
C A S E S R E P O R T E D .

	PAGE
Carter v. Palmer	397
East India Company v. Champion	158
Garland v. Carlisle	421
Gordon v. Selby	351
Hodgens v. Hodgens	62
Latimer v. Neate	112
Milltown v. French	1
Mortimer v. Trezevant	191
Walker v. Hardman	229

TABLE OF CONTENTS.

VOL. XI. — PART I.

	Page
Milltown v. French.	
<i>Devise — Construction — Real Estate — Le-</i>	
<i>gacies — Interest</i> - - -	1
Hodgens v. Hodgens.	
<i>Ward of Court — Contempt — Proposals —</i>	
<i>Draft — Settlement — Report — Elopement</i>	
<i>of Wife — Maintenance of Children — Wife's</i>	
<i>Equity</i> - - -	62
Latimer v. Neate.	
<i>Debtor and Creditor — Execution — Property</i>	
<i>in Goods in Possession of Debtor — Dis-</i>	
<i>covery — Production of Deeds</i> - -	112
East India Company v. Champion.	
<i>Interpleader, Bill of — Fund — Jurisdiction</i>	
	158




 *The Cases reported in the present Number were already printed, and just about to be published, when the death of the late Reporter unexpectedly occurred. Several other Cases were prepared by him, and ready for publication, which also will be published shortly, for the benefit of the Widow and Children.*

TABLE OF CONTENTS.

VOL. XI. — PART III.

	Page
Gordon v. Selby.	
<i>Fraud — Want of Consideration — Resulting Trust</i>	- 351
Carter v. Palmer.	
<i>Compromise of Debt — Counsel — Breach of Confidence — Form of Decree</i>	- 397
Garland v. Carlisle.	
<i>Sheriff — Liability of Conversion — Act of Bankruptcy</i>	- 421

REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session 1837,

7th W. IV. & 1st VICT.

IRELAND.

(COURT OF CHANCERY.)

The Right Honourable JOSEPH LEESON Earl of MILLTOWN, and BARBARA Countess of MILL- TOWN, his Wife	}	<i>Appellants;</i>
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The Honourable WILLIAM LE POER TRENCH, and Others,	}	<i>Respondents.</i>
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C. by his will devised to trustees all his real estates for a term of 500 years, upon trust, if there should be issue of his marriage, to raise and pay to his wife during her life an annuity of 2000*l.*, in addition to a provision of 400*l.* a year made for her by the will of his father, but in satisfaction of dower. The further trusts of this term were to raise portions for younger children, with provisions for maintenance; and in case of a deficiency of personal estate to pay debts and the legacies given by the will, to raise after the death of his wife, by sale, &c. of the term, such sum as should be sufficient to discharge the legacies, &c.; and subject to the term, he

1837.

MILLTOWN
v.
TRENCH.

limited the estates to his first and other sons in tail male, remainder to his daughters in tail general; and in default of such issue, to his wife for her life in lieu of dower, and in satisfaction of all provision by his own or his father's will; with remainders over. The testator then gave to M. his wife's sister 4000*l.* to be paid within one year after his death, with interest at 5 per cent. until paid; and 3000*l.* to be laid out in the public funds upon trust, to pay the interest to the separate use of O., a married sister of his wife, and the principal to the use of her children at her death. He then bequeathed to divers persons, his kinsmen and others, a great number of pecuniary legacies of various amounts, but only in the event of his dying without issue living at his death; and many of these legacies were limited for life interests to parents, with remainder to children. Finally, the testator by his will gave a legacy of 2000*l.* in trust for a charity, and 2000*l.* to his wife, which he directed should be paid to her in any event, and in preference to all other legacies (except the charitable bequest), with interest from his decease, at 5 per cent. He then directed "that all the legacies by his will bequeathed, " should from the time when they should respectively become " payable, bear interest at the rate of 5 per cent., and be " raised and paid accordingly: that his funeral and adminis- " tration expenses, and the charitable bequest, should be " paid out of the produce of his personal estate: that the " residue thereof should be applied in payment of his debts, " and the other legacies which should take effect and become " payable under his will; and in case his personal estate " should be insufficient for that purpose, he charged the lands, " &c. comprised in the term, with the payment of such debts " and legacies, and directed the trustees to raise the same, " pursuant to the trusts vested in them for that purpose;" and subject to the payment of such debts and legacies, the testator bequeathed the residue of his personal estate to his wife.

The testator died without leaving issue. The personal estate was deficient, and after application of the rents, &c. of the real estates comprised in the term to supply the deficiency, including interest upon the legacies, there would be a surplus of rents amounting to 3,400*l.*, to which the widow as tenant for life under the will would have been intitled.

Held (affirming the decree) that the interest upon the legacies was payable out of the real estate, during the life of the wife.

CHARLES HENRY Baron Castlecoote, by his will, bearing date the 14th of September, 1822, devised to the Honourable William Le Poer Trench, the Plaintiff in this cause, and to Hulton Smith King, since deceased, and to John Sealy Townsend, Esq., one of the Defendants in this cause, and the survivors and survivor of them, all his government stock and stock in the government English and Irish funds, which he was then possessed of or entitled to, and all sum and sums of money, stock, long annuities, or other personal or funded property to which he was or should be entitled in possession or reversion under the will of his late uncle, Oliver Tilson, with all interest and dividends due and to grow due thereon respectively, in trust that they should stand and be possessed thereof, and should take and receive the interest, dividends and annual produce of said stock and securities from and after his decease, and pay the same to his son, Eyre Tilson Coote, in the said will called Eyre Coote, or permit and suffer or duly authorize and empower him to take and receive the same yearly and every year as the said interest and dividends or proceeds should accrue during his natural life, to and for his own use and benefit; and from and after the decease of his said son, in case his said son's then present wife, Barbara Coote, should survive him, in trust out of the said interest, dividends and annual produce of the said stock and securities, yearly and every year during the natural life of the said Barbara Coote, to pay to the said Barbara Coote one annuity or annual sum of 400*l.* sterling, over and above all deductions during her life :

1837.

MILLTOWN
v.
TRENCH.

1837.

 MILLTOWN
 P.
 TRENCH.

And after various bequests and devises of personal property and lands, and of certain specific and pecuniary legacies in his will particularly mentioned, the testator directed that all his debts, legacies, funeral, and administration expenses should be paid out of his personal estate, not thereby otherwise bequeathed, (of which arrears of rent would form a considerable part), and if the same (subject to the charges and trusts therein-before mentioned,) should be insufficient for that purpose, he thereby charged and incumbered all his real and freehold estates with the payment thereof; and subject to the payment thereof, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, real, freehold, and personal, of what nature or kind soever not therein disposed of unto his son, Eyre Tilson Coote, his heirs, executors, administrators, and assigns, to and for his and their own use and benefit. And the testator thereby nominated, constituted, and appointed his brother Sir Eyre Coote, and the testator's agent John Hawkesworth, Esq., executors of his will, and thereby revoked all former wills and codicils by him made, and declared that to be his last will and testament.

On the 22d of February, 1823, Charles Henry Lord Baron Castlecoote died, without altering or revoking his will, leaving Eyre Tilson Coote, his only child him surviving, who thereupon entered into the receipt of the different properties in the will mentioned.

William Le Poer Trench and Hulton Smith King, two of the trustees named in the will, filed their original bill in the Court of Chancery in Ireland, on the 26th of January, 1825, against Eyre

Tilson Lord Baron Castlecoote, the son of Charles Henry Lord Castlecoote, and several others, to carry the trusts of the will into execution, and thereby prayed that the will might be decreed to be well proved, and that the trusts thereof might be carried into execution, by and under the authority and directions of the Court of Chancery; and that for that purpose all necessary accounts might be ordered and directed to be taken, and particularly an account of the real and freehold estates of Charles Henry Lord Baron Castlecoote, deceased, and of the incumbrances and charges thereon; and also an account of the personal estate of the said Charles Henry; into whose hands the same had come, and how the same had been applied; and an account of his debts, legacies, and funeral expenses, and the expense of taking administration and proving the will; and, if necessary, that an account might also be taken of the personal estate of John Hawkesworth, the executor of the said Charles Henry; into whose hands the same had come, and how the same had been applied; and that the debts and legacies might be directed to be paid out of the said funds, and in such manner as should be fit and proper according to the rules of equity; and that, if necessary, the assets should be marshalled for that purpose; and that such parts of the personal estate as might be necessary for the purposes expressed in the will might be set apart, assigned, transferred, or invested, &c.

Eyre Tilson Lord Baron Castlecoote, and Barbara Castlecoote, his wife, on the 8th of April, 1826, filed their answer to the original bill, and upon the 4th of November, 1826, filed a further answer thereto.

1837.


MILLTOWN
v.
TRENCH.

1837.

MILLTOWN
v.
FRENCH.

Eyre Tilson Lord Castlecoote died, without issue, on the 24th of February, 1827, leaving Barbara Lady Castlecoote his widow. By his will, bearing date the 23d of October, 1826, he devised unto Francis Gore and George Frederick Brook, their heirs, executors, and administrators, among other properties, the several estates devised to him by his father Charles Henry Lord Castlecoote, together with all his real, freehold, and leasehold estates, messuages, lands, tenements, and hereditaments, whether for lives or years, situate, lying, and being in the counties of Dublin and Kildare, in the Queen's County, in the counties of Kilkenny, Tipperary, Clare, and Limerick, and elsewhere in Ireland; and also the impropriate tithes which formerly belonged to the Earl of Thomond, in the county of Clare;

To the uses, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, conditions, and limitations thereafter expressed concerning the same; (that is to say,)

To the use of William Furlong, and John Smith Furlong, barrister at law, and the survivor of them, and the executors, administrators, and assigns of such survivor, for and during the term of 500 years, to commence and be computed from the time of his decease;

Upon trust, that they the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, should and might out of the rents and profits of the hereditaments and premises comprised in the said term, or by mortgage, sale, or disposition thereof, for all or any part of the said term, or by any other lawful ways or means they should think fit,

levy and raise, during the natural life of his wife, Barbara Lady Castlecoote, in case there should be issue of his said marriage, who should be living at his death, an annuity or clear yearly sum of 2000*l.*, clear of all deductions whatsoever, in addition to the provision made for her by the will of his said late father, but in lieu, full satisfaction, and discharge of any dower or thirds which she might claim or be entitled to out of his real or personal estate, and might and should pay the same annuity or yearly sum, as the case might be, unto his said wife or her assigns, for her own proper use and benefit during her natural life, by equal quarterly payments, on every 1st of January, 1st of April, 1st of July, and 1st of October in every year; the first payment thereof to be made on which ever of the said days should next happen after his decease; with powers of distress and entry in case any quarterly payment of the said annuity or yearly sum, or any part thereof, should at any time be in arrear and unpaid, by the space of twenty-one days next after any of the said days appointed for payment thereof.

And upon further trust, that in case there should be one or more child or children of his body by his said wife Barbara Lady Castlecoote, other than and besides an eldest or only son, living at the time of his decease, or born in due time thereafter, they the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, might and should, after his the testator's decease, and after the decease of his said wife Barbara Lady Castlecoote, by demise, mortgage, or sale, or other disposition of all or any of the said messuages,

1837.

MILLTOWN


v.

TRENCH.

1897.

MILLTOWN
P.
TRENCH.

lands, hereditaments, and premises comprised in the said term of 500 years, or any part or parts thereof, for all or any part of the said term, and by and out of the rents, issues, and profits thereof, or by all or any other ways or means they should think fit and reasonable, levy and raise such sum and sums of money, for the portion and portions of all and every such younger child and children, be the same a daughter or daughters, younger son or sons, as are thereafter mentioned; that is to say, if there should happen to be but one such child besides an eldest or only son, then the sum of 10,000*l.* for the portion of such younger child, to be paid and payable at such time and in such manner as his said wife Barbara Lady Castlecoote, in case she should survive him, by any deed or instrument in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published, in the presence of three or more credible witnesses, should direct or appoint; and in default of such direction and appointment to be paid to such younger child, being a son, at his age of twenty-one years; or being a daughter, at her age of twenty-one years, or day of marriage, which should first happen: And if there should be two or more such children, other than and besides an eldest or only son, then the sum of 20,000*l.* for their portions, to be shared and divided between them in such parts and proportions, and to vest in and be paid to such children respectively, at or upon such ages, days, or times, and to be subject to such charges, conditions, and limitations, (such charges and limitations being for the benefit of some or one of them,) and in such manner as




his said wife Barbara Lady Castlecoote in case she should survive him, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be signed and published by her in the presence of and attested by three or more credible witnesses, should direct and appoint; and in default of such direction and appointment, to be equally divided between or amongst such younger child or children share and share alike.

And the said testator, by his said will, directed that the share or shares of such of the said children as should be a younger son or sons, should be paid to him or them at his or their age or respective ages of twenty-one years; and the share or shares of such of them as should be a daughter or daughters, to be paid to her or them, at her or their respective ages of twenty-one years, or day or days of marriage, in case the same should happen after the decease of his said wife; but in case any of such younger children, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain her or their age or respective ages of twenty-one years, or be married as aforesaid in the lifetime of his said wife, then the share or shares of such younger child or children should be a vested interest or vested interests in him, her or them respectively; but the payment of their share or shares should be postponed until after the decease of his said wife, unless she should signify her consent, that the same should be raised and paid in her lifetime: And upon further trust, that they the said William Furlong and John Smith Furlong, and the survivor of them, his exe-

1837.

MILLTOWN

D.
TRENCH.

1897.

 MILLTOWN
 &
 TRENCH.

cutors and administrators, might and should, out of the rents, issues and profits of the premises comprised in the said term of 500 years, levy and raise such yearly sum as would be equivalent to the interest of the said sum of 10,000*l.*, or of the said sum of 20,000*l.*, as the case might be, at and after the rate of 5*l.* for every 100*l.* by the year; and also might and should pay and apply such sum for the maintenance and education of such child or children, until such child or children should become entitled to his or their portion as aforesaid.

Provided always, and he thereby declared, that in case of the death of any such children (if there should happen to be more than one) before his or her respective portions should become payable as aforesaid, then and in such case, and in default of, and subject to such appointment by his said wife as aforesaid, the portion or share of the child or children so dying, should accrue and belong to the survivor or survivors, and other or others of such children, and should vest in and be paid to her or them, if more than one, in equal parts or shares, at the same time and in like manner as their original portion or portions.

And upon the further trust, that in case his personal estate should be found insufficient for the payment of his debts, and the several legacies and charitable bequests which should, under the provisions of his said will, take effect and become payable; then the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, might and should, after his decease, and after the decease of his said wife, by demise, sale or mortgage, or other disposition of all or any of the messuages,

hereditaments and premises comprised in the said term of five hundred years, or a competent part thereof, for all or any part of the said term, or by and out of the rents, issues and profits thereof, or by all or any other ways or means they should think fit and reasonable, levy and raise such sum and sums of money as should be sufficient to discharge the said bequests or legacies, or such of them respectively as should take effect and become payable under his said will, and for discharge whereof his personal estate should be found insufficient as aforesaid :

And the said testator declared it as his will, that when and if the said trustees or trustee for the time being of the said term, should proceed to raise or levy the several sums of money for the purposes and pursuant to the trusts aforesaid, by sale or mortgage of the premises therein comprised, the trustees or trustee of the inheritance should, if required by the trustees or trustee of the said term, convey either absolutely or in mortgage, the fee of the premises to be then sold or mortgaged ; and all and every the messuages, lands and hereditaments so sold or mortgaged should be and remain thenceforth and for ever (subject only to the proviso or condition of redemption in any such mortgage or mortgages contained) freed and discharged of and from all and every the uses, trusts, limitations, charges, powers and provisos thereby limited, declared or expressed of or concerning the same, and then and from thenceforth the direction, limitation or appointment thereby made, should be and enure, as to so much of the premises as should be so sold or mortgaged, to the only proper use and behoof of the purchaser or purchasers, mortgagee or mort-

1837.


MILLTOWN
v.
TRENCH.

1837.

MILLTOWN

v.

TRENCH.

gagees thereof, and their heirs, executors or administrators.

And the said testator by his said will declared, that when the trusts of the said term of five hundred years should be respectively executed and performed or satisfied, or should have become unnecessary or incapable of taking effect, and the expenses of the said trustees or trustee, his executors or administrators, in and about the execution of the said respective trusts, should have been fully paid and satisfied, then and immediately thenceforth the said term of five hundred years of and in the premises therein comprised for the purposes aforesaid should cease, determine and be utterly void, to all intents and purposes, any thing therein contained to the contrary in anywise notwithstanding; but without prejudice to any sale, mortgage or other disposition which should be made, if any should be made, of the premises comprised in the said trust term, in pursuance of the respective trusts aforesaid.

And from and after the expiration or other sooner determination of the said term, and in the mean time subject thereto, and to the trusts thereof respectively, to the use of his first and other sons successively of his body, on the body of his said wife Barbara Lady Castlecoote, begotten or to be begotten, in tail male, with remainder to the use of all and every the daughter or daughters of his body, on the body of his said wife Barbara Lady Castlecoote, begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, to take as tenants in common, and not as joint tenants in tail general, with cross remainders between them in tail general;

and for default of such issue of his body by his said wife, Lady Castlecoote, sons or daughters, who should be living at the time of his decease, the said lands and premises are limited to the use of his said wife Barbara Lady Castlecoote and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste, in lieu, full discharge and satisfaction of any dower, jointure or other provision theretofore made or provided for, or settled upon her by the testator's late father, or by his the said Eyre Tilson Lord Castlecoote's will, or in any other manner; and from and after the determination of that estate, to the use of his kinsman Eyre Coote, of Westpark, in Hampshire, esquire, for life, without impeachment of or for any manner of waste; with remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the said Eyre Coote, to the use of the first and other sons of the said Eyre Coote successively in tail male; and for default of such issue, to the use of all and every the daughter and daughters of the said Eyre Coote, equally to be divided between or among them, if more than one, share and share alike, to take as tenants in common, and not as joint tenants, in tail general, with cross remainders between them in tail general; and for default of such issue of the body of the said Eyre Coote, to the use of the testators own right heirs.

And the testator, by his will, gave and bequeathed to his sister-in-law Maria Meredyth the sum of 4,000*l.*, to be paid one year after his decease, with interest at the rate of 5*l.* for every 100*l.*, by the year until paid; to be paid and payable to trustees, if she should be then married, to and for

1837.

MILLTOWN

v.

TRENCH.

1837.


MILLTOWN
v.
TRENCH.

her own sole and separate use, free from the debts, control and intermeddling of her husband.

And the testator, by his will, gave and bequeathed to his executors thereafter named, the sum of 3,000*l.*, upon trust to lay out and invest the same in the purchase of parliamentary stocks or funds, in the names of his executors, and to alter and vary the same as and when they should think proper, in trust to pay the yearly interest, dividends and other proceeds of the funds and securities upon which the monies should be invested, to his sister-in-law Frances O'Reilly, otherwise Meredyth, the wife of Philip O'Reilly, esq., during her natural life, to and for her own sole and separate use, upon her own receipt, and free from the debts, control or intermeddling of her said husband; and upon and after the decease of said Frances O'Reilly, in trust by sale or transfer of said stocks, funds and securities, or by any other ways or means as might be necessary, to raise and pay the said sum of 3,000*l.* to and amongst the children of the said Frances O'Reilly, in such shares and proportions, and at such time or times, as she should by deed, or by her last will and testament, attested by two or more credible witnesses, direct and appoint; and for want, and in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike, and if but one, then the whole to such one child.

And in case it should happen that there should be no issue of his body by his wife, Barbara Lady Castlecoote, begotten or to be begotten, living at the time of his decease, or born in due time afterwards, then and in that case he gave and be-

queathed unto his executors, thereafter named, the sum of 2,000*l.*, upon trust to lay out and invest the same in the purchase of parliamentary stocks or funds, or upon other real and sufficient security, in the name of his executors, and to alter and vary the same as and when they should think proper, in trust to pay the yearly dividends and other proceeds thereof to his kinsman, Major-General James Bathurst, son of the Lord Bishop of Norwich, and his assigns, during his natural life; and from and after his decease, in trust by sale or transfer of such stocks, funds or securities, or by such other ways or means as might be necessary, to raise and pay the said sum of 2,000*l.* for and amongst the children of the said James Bathurst, in such shares and proportions, and at such time or times, as he should by deed or writing, or by his last will and testament, attested by two or more credible witnesses, direct and appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike, and if but one, then the whole to such one child.

And in case there should be no such issue of testator's body as aforesaid, he gave and bequeathed unto his executors the sum of 2,000*l.*, upon trust in like manner to lay out and invest the same in the purchase of such stocks or funds, or such other real and sufficient security as aforesaid, and to alter and vary the same as they should think proper, in trust to pay the yearly interest, dividends and other proceeds thereof to his kinsman, Henry Bathurst, and his assigns, during his natural life; and from and after his decease, in trust by sale or mortgage of such stocks, funds, securities, or by

1837.

MILTOWN
v.
TRENCH.

1837.


MILLTOWN
v.
TRENCH.

such other ways and means as might be necessary, to raise the sum of 2,000*l.*, and pay the same to and amongst the children of the said Henry Bathurst, in such shares and proportions, manner and form as he should by deed in writing under his hand and seal, or by his last will and testament, respectively attested by two or more credible witnesses, direct or appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike; and if but one, then the whole to such one child.

And if there should be no such issue of testator's body as aforesaid, he gave and bequeathed to his executors the sum of 2,000*l.*, upon trust in like manner to lay out and invest the same in the purchase of such stocks or funds, or upon such other real and sufficient security as aforesaid, and to alter and vary the same as they should think proper, in trust to pay the interest, dividends and proceeds thereof, to his kinsman, Robert Bathurst, and his assigns, during his natural life; and after his decease, in trust by sale or transfer of such stocks, funds or securities, or by such other ways and means as might be necessary, to raise the sum of 2,000*l.*, and pay same to and amongst the children of the said Robert Bathurst, in such shares and proportions, manner and form as he should by deed or writing under his hand and seal, or by his last will and testament, to be respectively attested by two or more credible witnesses, direct or appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally

share and share alike; and if but one, then the whole to such one child.

And also, if there should happen to be no such issue of his body as aforesaid, the testator gave and bequeathed to his cousin german, Mrs. Henrietta Mahon, otherwise Bathurst, the sum of 1,000*l.* for her sole and separate use, free from the debts, control or intermeddling of her husband.

And also, in case of no such issue of testator's body as aforesaid, testator gave and bequeathed to his cousin, Caroline De Crespigny, otherwise Bathurst, wife of ——— De Crespigny, esq., son of the late Sir Edward De Crespigny, bart., the sum of 1,000*l.* for her sole and separate use, free from the debts, control or intermeddling of her said husband; to his cousin, Tryphinia Bathurst, the sum of 1,000*l.*, with interest at 6*l.* per cent. by the year until paid; to his kinsman, Arthur Magan, the sum of 1,000*l.*: then followed divers other pecuniary legacies of different amounts to various kinsmen and others.

And the testator by his will declared that the legacies to his sisters-in-law, Maria Meredyth and Frances O'Reilly; and also the legacies to the said Francis Gore, George Frederick Brooke and Richard Steele Hawkesworth, should in any event, be raised and paid, without prejudice however to the charitable bequest therein-after mentioned; but that the several other legacies thereby bequeathed in manner aforesaid, should not take effect or be paid or payable unless there should be no such issue of testator's body by his said wife living at the time of his decease or born afterwards as aforesaid; and he also directed that all the legacies thereby bequeathed should, from the time when

1837.

MILLTOWN

v.

TRENCH.

CASES IN THE HOUSE OF LORDS

1887.

HALLOW
in
PRINCE.

they respectively became payable, bear interest at the rate of 5*l.* per centum per annum, and be raised and paid accordingly.

And he gave and bequeathed the sum of 2000*l.*, to the Rev. Dr. Murray, Roman Catholic Bishop of Dublin, or, in case of his decease, to his successors to said bishoprick, for the use and benefit of the schools for the education of the poor of the united parishes of Sandymount Glencullen and the adjacent parishes in the county of Dublin. And he gave and bequeathed to his said wife, Barbara Castlecoote, the sum of 2,000*l.*, which he directed to be paid to her in any event, and in preference to all the legacies thereby bequeathed, except the aforesaid charitable bequest : the said legacy to his wife to be paid to her with interest from his decease at the rate of 5*l.* per centum per annum. And he also gave and bequeathed to his said wife Lady Castlecoote, all his jewels, plate, china, linen, furniture, books, carriages, horses, carts, farming utensils, and her own wearing apparel and ornaments of her person.

And the testator thereby directed that his funeral and administration expenses and charitable bequests be paid out of the produce of his personal estate ; and after payment thereof, then he directed the residue of his personal estate to be applied in payment of his debts, and the several other legacies which should take effect and become payable under his said will. And in case his personal estate should be insufficient for that purpose, he charged the estates, lands and premises comprised in the said term of five hundred years, with the payment of his debts and of the legacies thereinbefore bequeathed, except and to the exclusion of the

charitable bequests, which were to be paid out of his personal estate; and he directed the trustees of the term of five hundred years to raise the same pursuant to the trusts vested in them for that purpose; and subject to the payment of such debts and legacies, the testator gave and bequeathed all the rest, residue, and remainder of his personal estate and effects to his wife, Barbara Lady Castlecoote, for her own use and benefit.

The testator thereby nominated, constituted, and appointed John Hawkesworth, and Richard Steele Hawkesworth, executors of his will.

On the 17th of March, 1827, a bill of revivor and amendment was filed by the Plaintiff William Le Poer Trench, setting forth amongst other things, that Hulton Smith King departed this life, leaving the Plaintiff and John Sealy Townsend, his co-trustees in the will of Charles Henry Lord Castlecoote named, him surviving; and also setting forth that Eyre Tilson Lord Castlecoote shortly after the filing of his further answer, and before any further proceedings were had in the cause, that is to say, on or about the 24th of February, 1827, departed this life, leaving Barbara Lady Castlecoote, his widow, him surviving, without having had any issue; and stating that by the decease of Eyre Tilson Lord Castlecoote, who was the heir-at-law and personal representative of his father Charles Henry Lord Castlecoote, the suit so instituted by the Plaintiff and Hulton Smith King became abated; and the Plaintiff by his bill also set forth the will of Eyre Tilson Lord Castlecoote.

The bill of revivor and amendment, prayed, that the said suit and all proceedings therein had, which

1837.


MILLTOWN
v.
TRENCH.

1837.

MILLTOWN
v.
TRENCH.

became abated by the decease of Eyre Tilson Lord Baron Castlecoote, might stand revived against Eyre Coote, as the heir-at-law, and John Hawkesworth, junior, and Richard Steele Hawkesworth, as the personal representatives of Charles Henry Lord Castlecoote, and Eyre Tilson Lord Castlecoote, respectively, and be in the same plight and condition as the same were in at the time of the abatement thereof in the manner aforesaid; or that Eyre Coote, and John Hawkesworth, junior, and Richard Steele Hawkesworth, might shew good cause to the contrary, and that the Plaintiff might have the benefit of the said suit, and the proceedings thereon had in such manner as the Court might think proper; and that Plaintiff might have all and singular the relief prayed by the original bill; and that the rights of all parties interested in the execution of the trusts of the will of Charles Henry Lord Castlecoote, might be ascertained by the decree of the Court; and that in the event of the personal estate of Charles Henry Lord Castlecoote, applicable under the provisions of his will, to the payment of his debts and legacies, being found insufficient for that purpose, and in case it should so become necessary for the purposes of carrying the trusts of his will into execution, that a sale of the real and freehold estates, or a competent part thereof, might be directed for the payment of such debts and legacies, as the personal estate should be found insufficient to discharge; and that in that event an account of the prior incumbrances upon the real and freehold estates, and all the necessary accounts might be directed; and, if necessary, that a receiver might be appointed over the real and

freehold estates, to collect the rents, issues, and profits thereof, and to apply the same as the Court should think fit; and that Eyre Tilson Lord Baron Castlecoote might be declared to have made his election to take under the will of his father Charles Henry Lord Castlecoote, and that the several persons deriving under Eyre Tilson Lord Castlecoote might be decreed to give effect to all the provisions in the will of Charles Henry Lord Castlecoote contained, so far as they are compellable so to do, and so far as might be necessary for the carrying the trusts of the will of Charles Henry Lord Baron Castlecoote into execution; and that they might be decreed to do all acts necessary for that purpose; and in the event of its being found expedient with a view to the due execution of the trusts of the will of Charles Henry Lord Castlecoote, that the trusts of the will of Eyre Tilson Lord Castlecoote [should likewise be carried into execution under the directions of the Court; and that for that purpose an account of the real and freehold estates of Eyre Tilson Lord Castlecoote, and of the debts, legacies, funeral and testamentary expenses, and all other necessary accounts might be directed; and that the rights of all parties under the will of Eyre Tilson Lord Castlecoote might be ascertained; and that the estate and effects, real and personal, of Eyre Tilson Lord Castlecoote might be ascertained; and that the estate and effects, real and personal, of Eyre Tilson Lord Castlecoote might be applied and disposed of pursuant to the directions of his said will, in the discharge of his debts, legacies, funeral and testamentary expenses and otherwise as the Court should think proper; and that the said Plaintiff's

1837.

MILLTOWN
v.
TRENCH.

1837.

 MILLTOWN
 v.
 TRENCH.

bill might be deemed and taken as an original bill against such of the said Defendants as are not parties to the said original bill; and that the same might be taken as an amended bill, or such other bill as the Court should think fit, against such of the said Defendants as were parties to the said original bill.

On the 25th of April, 1828, Barbara Baroness Castlecoote filed her answer to the bill, and amongst other things alleged that she was ready and willing, that the will of Eyre Tilson Lord Castlecoote should be carried into execution, and that an account might be taken of the real freehold and personal property of Eyre Tilson Lord Castlecoote, of his debts, legacies, funeral and testamentary expenses, and that the properties of Eyre Tilson Lord Castlecoote might be disposed of pursuant to the directions of his will, and that the rights of all parties might be ascertained and adjusted.

In the month of June, 1828, Barbara Baroness Castlecoote intermarried with the Defendant the Right Honourable Joseph Leeson Earl of Milltown, upon which, articles of agreement bearing date the 28th of June, 1828, were entered into and made between Joseph Leeson Earl of Milltown, of the first part; the Defendant the Countess of Milltown, by her then title of Barbara Baroness Castlecoote of the second part; and John Francis Darcy, Esq. and the Right Honourable Baron Cloncurry, of the third part; and which were duly executed.

On the 21st of November, 1828, William Le Poer Trench amended the bill of revivor and amendment, and made John Francis Darcy and

Baron Cloncurry parties thereto; and, the cause being at issue, and witnesses having been examined on behalf of Plaintiff, and no witnesses having been examined on behalf of the Defendants, the cause came on to be heard before the Lord High Chancellor of Ireland, on the 1st of August, 1829, when his Lordship was pleased to order, adjudge and decree that the last will and testament of Charles Henry Lord Baron Castlecoote, deceased, in the pleadings mentioned, should be and the same was thereby declared well proved, and that the trusts thereof should be carried into execution; and, accordingly, that it be and it was thereby referred to William Henn, Esq., the Master in the said cause, to take an account of the real and freehold estates and chattels, real of the said Charles Henry Baron Castlecoote, and of the rents, issues and profits since his decease, and by whom received, and how disposed of, and of all incumbrances thereon at the time of his decease; and also to take an account of the personal estate of the said Charles Henry Baron Castlecoote (distinguishing the trust funds bequeathed to the Plaintiff and his co-trustees, by the will of the said Charles Henry Lord Baron Castlecoote, from the residue of the said personal estate) into whose hands the same came respectively, and how applied and disposed of; and also to take an account of the debts, legacies, funeral and testamentary expenses of the said Charles Henry Baron Castlecoote, and whether any and which of them had been paid and by whom, and out of what funds, and whether any and which of them still remained outstanding; and to take an account of the real and freehold estates and chattels real of Eyre Tilson

1837.

MILLTOWN
v.
TRENCH.

1837.

MILLTOWN

v.

TRENCH.

Lord Baron Castlecoote, in the pleadings also named, and of the rents, issues and profits thereof since his decease, into whose hands the same came, and how applied and disposed of; and also an account of the personal estate of the said Eyre Tilson Lord Baron Castlecoote, by whom received and how disposed of; and also an account of the debts, legacies, funeral and testamentary expenses of the said Eyre Tilson Lord Castlecoote, and of all incumbrances affecting the real and freehold estates at the time of his decease; and also to enquire and report whether the said Eyre Tilson Lord Castlecoote did in his lifetime make his election to take under the said will of his father the said Charles Henry Lord Castlecoote.

Pursuant to the decree, the Master made his report, bearing date the 11th of June, 1833, whereby he reported the amount of the real and personal estate, and the debts, legacies, and funeral expenses of Charles Henry Lord Castlecoote and Eyre Tilson Lord Castlecoote.

The cause came on to be heard upon the report on the 20th of June, 1833, when the Lord Chancellor decreed, that it be referred to William Henn, Esquire, one of the Masters of the Court, to report the value of the life interest of the Defendant, Eyre Coote, in the trust funds, devised and bequeathed by Charles Henry Lord Baron Castlecoote and Eyre Tilson Lord Baron Castlecoote, applicable to the payment of their debts, legacies, funeral and testamentary expenses respectively, and to report the priorities of the several demands comprised in the report, bearing date the 11th of June, 1833.

On the 31st of May, 1834, the Master made his report.

Shortly after the report had been made, and before the same was confirmed, the Defendant Eyre Coote, the heir-at-law of Eyre Tilson Baron Castlecoote, died, and thereupon a bill of revivor and supplement was filed on the 28th of October, 1834, wherein the Honourable William Le Poer Trench was Plaintiff, and Eyre Coote, a minor, (the son of the said Eyre Coote, deceased,) and Elizabeth Rosetta Massey Coote, John Kielly, and the Rev. William Johnston Yonge, executors of Eyre Coote deceased, were Defendants, by which it was prayed that Eyre Coote, as remainder-man in tail, and Elizabeth Rosetta Massey Coote and William Johnston Yonge, as personal representatives of Eyre Coote, might shew cause why the Plaintiff was not entitled to the benefit of the said suit, and the proceedings had thereon as against them respectively; and that the Plaintiff might have the benefit thereof, and might have the same relief against the said Eyre Coote, Elizabeth Rosetta Massey Coote, John Kielly and William Johnston Yonge, as upon the original bill, and the said amended bill and bill of revivor, he was entitled to against the Defendants thereto respectively; and that the said decree or decretal orders, bearing date the 1st of August, 1829, and the 20th of June, 1833, might be performed and carried into execution against the said Eyre Coote, Elizabeth Rosetta Massey Coote, John Kielly and William Johnston Yonge; and in addition to the aforesaid relief, in case his Lordship should seem fit so to do, that it might be referred to William Henn, esquire, the Master in the said cause, to inquire and report whether it would be


1837.

W. W.

MILLTOWN.

D.

TRENCH.

1837.

 MILLTOWN
 v.
 TRENCH.

for the benefit of the said Eyre Coote (he being an infant), that the accounts and other proceedings taken in this cause, in the interval between his coming *in esse* and the present time, should stand and be decreed binding on him, and, if so, that he might be declared accordingly bound thereby, or whether it would be more for his benefit that such accounts, and other proceedings, should be taken over again as against him.

The original and supplemental causes having been set down for hearing, the same came on to be heard on the 13th of February, 1835, when the Lord Chancellor decreed, that it be referred to the Master to inquire and report if it would be for the benefit of the minor, Eyre Coote, that the proceedings had and taken in the original cause since the said minor came *in esse*, or any and which of them should be adopted on his behalf, or whether it would be necessary for his benefit that the several accounts and other proceedings, or any and which of them should be had and taken as against him; and that the Master should specially state the circumstances upon which he should decide.

Upon the 6th of May, 1835, the Master made his report, and found that the said accounts so taken should be adopted; and that it would not be for the benefit of the said minor that the accounts should be taken over again.

Thereupon the cause came on to be heard on the 16th and 17th of June, 1835, before the Lord Chancellor, who decreed, that the Plaintiff should be entitled to the benefit of the former proceedings and decrees against the Defendant Eyre Coote (the minor), and that the said Defendant was bound thereby. And his Lordship further de-

clared that Eyre Tilson Lord Castlecoote, in his lifetime, made his election to take under the will of his father Charles Henry Lord Castlecoote, the estates thereby devised to him, and that he was bound to give effect to the provisions of the said will. (Then various directions were made pursuant to this declaration and decree.)

And it was referred to the Master to inquire and report whether there were any and what charges and incumbrances then subsisting, which at the time of the decease of the said Eyre Tilson Lord Castlecoote affected the several chattels real by the said report found to have belonged to the said Charles Henry Lord Castlecoote, at the time of his decease, and the sum due thereon respectively for principal, interests, and costs; and that a sale of the chattel interests should be made, and that the proceeds of such sale should be applied in payment of such charges and incumbrances (if any), and that the residue thereof, together with the other funds in the said report mentioned, being the personal estate of the said Eyre Tilson Lord Castlecoote at the time of his decease, was applicable to the payment of his debts and legacies according to the priorities found by the said report, and of the costs of the several parties thereafter mentioned. And that the said John Smith Furlong, surviving trustee in the will of the said Eyre Tilson Lord Castlecoote, should be entitled to his costs in the suit out of the said funds in the first instance. And in the next place that the said funds should be applied in payment of the debts and legacies of the said Eyre Tilson Lord Castlecoote, together with the costs in the said suit of such of the said creditors and legatees as were De-

1837.

MILLTOWN

D.

TRENCH.

1837.

MILLTOWN

v.
TRENCH.

fendants therein, according to the priorities found by the said report: and in the event of the said several funds (after payment of the demands and costs of the creditors, and the several legatees of the said Eyre Tilson Lord Castlecoote, who, by the said report, are found to be entitled to priority in relation to each other,) being insufficient for the payment of the several legatees, whose demands are, by the said report, found to have no priority in relation to each other, together with their costs in this suit, that the costs of the said several last-mentioned legatees in the said suit should be paid thereout, so far as the same should extend. And it was further decreed, that the said several last-mentioned legatees should abate rateably the amount of their demands on foot of their legacies. And his Lordship decreed that the balance which should remain due to them respectively for principal, interest, and costs (after the said several funds should be applied as aforesaid), was well charged on the lands and premises comprised in the term of 500 years, created by the will of the said Eyre Tilson Lord Castlecoote; but that the principal sums which should so remain due, and such portion of the costs aforesaid (if any), as should not have been paid out of the said personal estate, should not be raised or paid until after the decease of the Defendant the Countess of Milltown.

And his Lordship was further pleased to decree, that the said principal sums which should so remain due, and such portion of the said costs (if any) as should not have been paid as aforesaid, be raised by a sale of the said lands and premises, or a competent part thereof, for the residue of the said term of 500 years, upon the decease of the said Defend-

ant the Countess of Milltown, and be paid to the said legatees accordingly.

And his Lordship decreed that in the mean time, and during the life of the said Countess of Milltown, the interest on the said principal sums were well charged on the said lands and premises comprised in the said term of 500 years, and should be paid out of the rents, issues, and profits thereof, during the life of the said Countess of Milltown.

And his Lordship decreed that the Master should proceed forthwith to allocate the personal estates of the said Charles Henry and Eyre Tilson Lords Castlecoote, so far as the same consisted of funds at present available, and so far as such funds should extend among the several persons entitled thereto, according to the rights as thereby declared; and that all parties should be at liberty to apply from time to time as they might be advised.

The appeal was against the decree of the 17th of June, 1835, so far as the same directs that the interest on the unpaid legacies of Eyre Tilson Lord Castlecoote should be paid during the life of the Appellant the Countess of Milltown, out of the rents, issues, and profits of the lands and premises devised by the will to her.

For the Appellants, Mr. *Pemberton* and Mr. *Lynch*.


The effect of this will is, that the legacies with respect to which no time of payment is fixed, as far as there is personal estate applicable, would become payable at the end of twelve months from the death of the testator. A suit in which this appeal has been brought was instituted for the

1837.

MILLTOWN

v.

TRENCH.

1887.

 MILLTOWN
 v.
 FRENCH.

administration of the estates of Charles Henry Lord Castlecoote and Eyre Lord Castlecoote, and in the course of those proceedings it has been ascertained that there is a surplus of the estate of Charles Henry Lord Castlecoote, forming a part of the fund of his son Eyre Lord Castlecoote, and that the personal estate of Eyre Lord Castlecoote is sufficient for the payment of all his debts, and also for the payment of certain legacies which, subject to the decree of the Court, entirely in accordance with the intention of the testator, and of which no complaint has been made, are declared to have priority over all others. These were the two first legacies payable at all events, — the charitable legacies, the bequest to Lady Castlecoote, and the legacies to Mr. Gore, Mr. Brooke, and Mr. Hawkesworth. There remains sufficient for payment of the whole of those legacies, but not for the payment of the other legacies; the consequence of which is, that the deficiency of the personal estate for the payment of the other legacies is admitted to be a charge on the real estate. With respect to these legacies they stand thus, — they are charged upon the term of 500 years, subject to such trusts as attach upon that term. Lady Castlecoote, who has intermarried with Lord Milltown, is tenant for life of the lands, &c., subject to that term; it has been so decided in the Court of Ireland; and it is clear, that these legacies are not to be raised until the death of Lady Milltown. On the other hand it has been declared, and it is against that part of the order of the Court below, this appeal is brought; that, during the life of Lady Milltown, interest is to be raised upon those legacies out of the rents, issues, and profits of the premises so devised, and

the important question your Lordships are now called upon to decide is this,—not simply whether interest is or is not payable, but whether, if interest be payable upon those legacies, that interest is to be raised out of the reversionary term, or whether it is to be raised during the life of Lady Milltown out of her life estate.

The first question is whether, with respect to that portion of these legacies which is to be raised out of the real estates, any interest is payable at all during the life of Lady Milltown. The rules upon this subject are familiar to your Lordships. Interest is payable for delay of payment and, therefore, it never becomes due until the period of payment arrives, and until that payment is delayed. The case of children and those who take under the will of persons placed in the situation of parents is an exception to the rule. At what period then, in this case, are these legacies payable, so far as applies to the real estates? The decree declaring that both the terms of the will and the intention of the testator have expressed that these legacies shall not be raised until after the death of Lady Milltown. Is there not some inconsistency, if the legacies themselves are not payable until after a given event, in holding that the intention can be to give interest upon those legacies in the mean time? It may be said, in this case, the legacies are payable out of the personal estate; that they are payable therefore, and bearing interest at the expiration of twelve months from the death. That is perfectly true as far as the personal estate is concerned, and if we were dealing with the personal estate there could be no question upon the subject; but it does not follow, that when the real estate is charged

1837.

MILLTOWN

v
TRENCH.

1897.

 MILLTOWN
 v.
 WRENCH.

with the payment of any deficiency of the personal estate therefore the same principles apply to that auxiliary fund.

The rule first established in *The Duke of Chandos v. Talbot* *, and which has since been adhered to, is that in the case of a legacy payable at twenty-one, charged upon the personal estate, and supposing the personal estate should be insufficient, on the real estate, (the personal estate being sufficient for a part but not for the whole), if the legatee dies before twenty-one; as far as there is personal estate he takes the benefit of the gift, for the legacy does not lapse before the period fixed for the payment; but as far as respects the real estate the legacy fails entirely, and it does not follow because the real estate is the auxiliary fund, that therefore it is subject to the same rules which apply to the primary fund. In this case, therefore, it is not to be contended that interest shall be payable out of the real estate because the legacies, as they respect the personal estate, are payable at the death of the testator. As far as respects the personal estate, they might be payable at his death: there may be, as far as respects the personal estate, a delay of payment, and, upon that ground, interest would be payable upon those sums. But how, as regards the real estate, can this be said to have been subjected to any delay of payment, since, by the express terms of the will, the legacies are not to be raised and not to be paid until after the death of Lady Milltown? even, supposing interest is payable, can it be raised except according to the directions of the testator's will for that purpose? How has he directed that interest to be raised?

* 2 P. W. 601.

He has charged those legacies, it is true, upon the estates; but how? By directing the trustees to raise the amount of them after the death of Lady Castlecoote. If, on other principles, your Lordships should be of opinion that interest would be payable from the death of Lord Castlecoote, it is not contended that the postponement will defeat the legatees of the payment of this interest. It has been laid down by Lord Hardwicke, and afterwards by Lord Thurlow (but it was supposed erroneously), that if a man gave a legacy out of a reversionary fund, that shewed that no interest was payable in the mean time. But the principle applicable to the case is this, — if the interest is payable at all it is to be raised by the trustees as they are directed to raise it, namely, out of the estate, after the death of Lady Milltown. In this will, where you find that with respect to the interest upon those legacies given to the children, the testator, considering they must not be left without provision, has directed the interest to be raised, during the lifetime of Lady Castlecoote, though he has postponed the payment of the legacy as to her, can there be any doubt of the intention of the testator?

In cases on this point, which have come into controversy in the Courts, the question has been, whether if legacies are chargeable on a reversionary fund you can raise them out of anything but the reversionary fund. But the precise question is, whether you can infer, from the circumstance of their being charged on the reversionary fund, that they were to take effect before the reversionary fund came into possession. The great case is

1837.

MILLTOWN

v.

TRENCH.

Codrington v. Lord Foley *, in which Lord Eldon refers to the rule as laid down by Lord Cowper, thus, “ That though a term is limited in remainder, “ to commence after the death of the father, yet “ if the trust is to raise a portion, payable at the “ age of eighteen or day of marriage, without ques- “ tion the daughter shall not wait the death of her “ father, but, at the age of eighteen or marriage, “ may compel a sale of the term. So it is if the “ trust of a term for raising daughters’ portions be “ limited to take effect in case the father dies “ without issue male by his wife, and the wife die “ without issue male, leaving a daughter, in such “ case the term is saleable in the life of the father.”

Then as to the supposed rule, that the Court has leant strongly against directing the payment of a legacy out of the reversionary interest, because it was prejudicial to the reversioner, and that the judges have held that there must be strong circumstances to induce them to decide that the portion was intended to be raised until the reversion vested in possession, Lord Eldon says, he disapproves of that construction; he holds that the intention must be found to decide that it is to be postponed, and that the Court is to hold an equal mind, as he terms it; that it is not because it is a reversionary fund that the payment is to be postponed, and that the inheritance must suffer the inconvenience.

There are many cases in which, where a legacy has been charged on a reversion, and it is to be paid at once, it is raised out of the reversion: *Davies v. Davies* †, *Freeman v. Simpson* ‡, and

* 6 Vesey, p. 376.

† Daniel’s Rep. p. 84.

‡ 6 Sim. p. 73.

other cases. There is no doubt you may raise a charge out of a reversionary interest as well as out of a present interest.

But it is said, that this is not a reversionary term, and that no doubt was the principal distinction relied upon by the Court below in the decision of this case, that this was not a reversionary fund, but a fund created antecedent to the life estate.

Lord Plunkett.—The counsel is very right; I have no note of the bearing, but that was the principal point on which the case was decided.

For the Appellants.—Then we must see whether, as far as the trusts of that term are concerned, this was a reversionary or a present term. It may be presumed that this decision would have been different, supposing this testamentary settlement had been drawn in the ordinary form in which conveyances are drawn. If there had been a term for ninety-nine years to secure jointures, and subject to that to raise portions for younger children, and in the case of no children at the death of the testator to a tenant for life, subject to that term of ninety-nine years for trustees to raise those legacies, it would then clearly have been a reversionary fund; and in that case, consistently with the authorities, there could be no doubt the legacies could not be raised before the event. When we are dealing with this term, which is a mere creature of equity, it is not to be considered as if it had been the imaginary case I have put. This term of years was to take effect from the death of the testator, because one of the trusts of that term required it should be prior to all other interests, since the testator contemplated that he might leave a child. The estate would be subject then

1837.

MILLTOWN

v.

TRENCH.

1837.

MILLTOWN

v.
TRENCH.

to what? To the payment of 2000*l.* a year to Lady Castlecoote. It was necessary, therefore, to interpose the term in this settlement prior to the first estate of freehold, and therefore it was of necessity that the term should be divided: the testator might have given it to trustees for ninety-nine years to support the jointure, instead of giving a term of ninety-nine years, with remainder to Lady Castlecoote for life, in the event which happened, with remainder to the trustees for another term to raise those charges. What is it the testator has done? He has declared trusts which, to a certain extent, exhaust the interest in that term, and subject to those trusts, to the extent to which they do not exhaust the interests, that term is to attend the inheritance. To the extent, therefore, in which no trusts are declared of that term, the owner of the freehold is entitled. Now to what extent do the trusts declared of this term exhaust the interest? In the event which has occurred it has become unnecessary to resort to the term during the life of Lady Castlecoote: her interest does not require the production or application of that term; but trusts are declared of that term during the life of Lady Castlecoote. Is there a trust declared during the life of Lady Castlecoote, except the trust for the security of her annuity in an event which never happened — a trust to secure charges for younger children — a charge which never happened? What is the other trust which attaches to that term? First, to raise those charges which by the will are thrown upon the term, but which by the same will it is declared are not to be raised until her death.

This must be considered in equity as if it were

a term of ninety-nine years to raise the jointure, with remainder to Lady Castlecoote for life: although legally the term exists, the right will attach only on the death of Lady Castlecoote; and therefore these legacies cannot be raised either as to principal or interest during her life. On these two grounds this decree ought to be reversed,—first, that inasmuch as this is a payment out of the real estate, and that payment not to be made until after the death of Lady Castlecoote, no interest can be payable to the legatees; secondly, that if any interest is payable to the legatees, that, like the principal, must be raised when the individual will come into possession of the fund, and when the fund on which that interest will be payable shall come to be raised.

Prowse v. Abingdon, 1 Atk. 482.; *Crickett v. Dolby*, 3 Ves. 10.; *Raven v. Waite*, 1 Swan. 553.; *Beckford v. Tobin*, 1 Ves. sen. 310.; *Lowndes v. Lowndes*, 15 Ves. 301.; *Stanley v. Stanley*, 1 Atk. 549.; *Brome v. Berkley*, 2 P. W. 484.; *Hall v. Carter*, 6 B. P. C. 108. 2 Atk. 355.

For the Respondents, Mr. *Knight* and Mr. *Tinney*.

There are two great rules to be applied in construing wills: first, that when the sense is doubtful, or technical words are untechnically applied, the intention of the testator should be sought by the aid of common sense, and according to the most probable meaning; secondly, that all the events contemplated by the will should be considered and weighed in deciding upon the intent, not the single event which has happened out of many which have failed.

1837.

MILLTOWN

v.
TRENCH.

In this case it might have happened that children of the testator might have been born and survived him, in which event the wife had 2,000*l.* a-year; and although the will directs, that the portions of younger children shall not be raised until after the death of the wife, it would have been plainly contrary to the intent that interest upon them should not be paid out of the estate during the life of the widow.

The words “after the death of the wife” in the clause for raising the legacies, are inserted probably by mistake of the copying clerk, as in *Langston v. Langston* *: by a similar mistake the word “first” (of the sons) was omitted, and that mistake was rectified by comparison with other parts of the will. So here it would be useless to postpone the debts and legacies if they were not to bear interest until after the death of the wife. As in the case of *Langston* it was not adjudged that the word could be supplied, so here we do not contend that the clause can be expunged; but that the inconsistency or absurdity of the provision is a ground for comparing and considering the whole context and scheme of the will to find the intent of the testator. If there had been issue of the marriage this would have been clear: the wife would then have had a fixed annuity, and no benefit would have accrued to her from postponing the payment of interest or raising the fund, but on the contrary, much prejudice; and the intent of the provision seems to apply equally to the event of his death without issue. It is to be observed, that in the clause directing the trustees to raise the legacies after the

* 8 Bligh, N. S. 167.

death of the wife, the word "interest" does not occur, and in the event of there having been issue, she would have suffered great inconvenience for want of maintenance for her younger children, if this clause were construed to exclude the payment of interest during her life. This is a will not framed according to the ordinary forms of conveying. It is usual to exhaust the limitations before the trusts of the term are declared. Here the order is reversed. Suppose there had been issue and a succession of infant tenants in tail, would the payment of interest have been suspended during the whole period? This would have operated as a heavy charge on the reversion and no benefit to the wife.

As to some of the legacies, they are expressly given with interest, and in any event, issue or no issue; and the charge on the real estate for interest upon the legacies cannot be construed to apply to some of them and not to others. No time is limited in the body of the gift for the payment of any of the legacies in particular, and therefore different rules cannot be applied to them.

Again, there is no trust declared as to the debts in the gift of the term; yet the testator afterwards says the trustees are to apply the term equally to raise the debts and legacies so far as the personal estate is deficient, and according to trusts which he erroneously supposes to be declared. How then is any distinction to be made between debts and legacies? It is admitted, that the debts must bear interest from the death of the testator and during the life of the wife. It is admitted also, that the legacies from that time bear interest, so far as the personal estate is applicable.

1837.

MILLTOWN

D.
TRENCH.

1837.

MILLTOWN

v

TRENCH.

By the accounts stated in the Master's Report, it appears that if there had been issue of the marriage, the rents of the estate would have been sufficient to provide interest upon the portions of younger children as well as to pay the annuity of the wife. In that event the immediate payment of interest upon the portions would have been beneficial to the wife. Why should the testator be supposed in the other event contemplated to have had a different intent which he has not expressed? — the words operating as a postponement, as it is argued, applying to the one event as well as to the other. To fix a running interest upon the estate of the reversioner would at least be burdensome; it might be destructive of his estate, if the estate of the tenant for life were of long duration: it is unusual, and will not be imputed to a testator without a clear intention. The wife might outlive many of the legatees, who in that case would have no personal benefit of the gift.

It is argued, that interest is given for delay of payment, which is true as a general proposition, but is hardly applicable to legacies upon which interest is so frequently provided, until the legacy itself becomes payable. The case of *Lyddon v. Lyddon** is an instance and authority.

The rule that a legacy shall not be raised in such a case, so far as real estate is concerned, does not apply to the question of the payment of interest. The legacies as to different funds may vest at different times. The allowance of interest is upon a supposed intent which must be the same as to both funds, and here the term is not reversionary, but in possession. How can a reversionary interest be

* 14 Ves. 558.

carved out of the term? Upon a mortgage of the term to raise the sum immediately, the legal estate must be assigned to the mortgagees.

The rules applicable to reversionary terms have nothing to do with this case. In those cases the life estate precedes the term, and cannot be affected by it. That is the effect of *Codrington v. Lord Foley*. This is in no sense a reversionary term; but the trustees have a legal estate in it, and an immediate interest and control over it—the very case put by Sir W. Grant in *Lyddon v. Lyddon*.

1837.
MILLTOWN
v.
TRENCH.

The Lord Chancellor.—In this case the point which was the subject of appeal was that part of the decree of the Court of Chancery in Ireland, which directed that the interest which should accrue upon the unpaid legacies of Eyre Tilson Lord Castlecoote, should be paid during the life of the Appellant the Countess of Milltown, out of the rents, issues, and profits of the lands and premises devised by the will, to her, (then Barbara Lady Castlecoote,) during her life. 19th March, 1837.

The will which gave rise to this question is exceedingly inaccurately penned, and therefore occasions great difficulty in coming to a sound and satisfactory construction, as to the part of it which constitutes the subject of this appeal to your Lordships. The outline of the will is that the testator created a term of 500 years in certain trustees, to the use of other trustees upon trust, by sale or mortgage, if there should be issue of the marriage, to raise a sum of 2000*l.* per annum, for his wife Lady Castlecoote, with a power of distress and entry for non-payment; and if there should be any younger children at the

1837.

MILLTOWN

v.

TRENCH.

testator's death, then the trustees, after the decease of his wife, were by sale or mortgage to raise portions for younger children,—10,000*l.* if there should be but one younger child, to be paid and payable at such time as Lady Castlecoote should direct, and in default thereof to be paid to such child being a younger son at the age of twenty-one, or being a daughter at the age of twenty-one, or marriage. If there should be more than one younger child, then 20,000*l.* was to be raised, to be paid at such time and ages as the wife should direct; and in default thereof, to the sons at twenty-one and to the daughters at twenty-one, or marriage, if the same should happen after the death of the wife, but not in her lifetime; that the portion should become vested at his death; but payment should be postponed until after her death, unless she should otherwise direct; and upon further trust, out of the rents and profits to raise such sum as would be equal to 5 per cent. on the said sum of 10,000*l.* or 20,000*l.* for the maintenance of the children, until such time as their legacies should become payable.

Then comes this direction which gave rise to the question now pending for your Lordships' consideration: "And upon further trust, if the person-
 " alty should not be sufficient for the payment of
 " his debts and legacies, then the trustees, after
 " the death of his wife, were by sale or mortgage,
 " or out of the rents and profits, to raise sufficient
 " to discharge the said bequests and legacies."
 Then there came an extraordinary direction, inas-
 much as it adverted to a state of circumstances
 which did not exist; namely, that the trustees of
 the inheritance, (there being none appointed by the

will,) were to join with the trustees of the term for the purpose of raising those sums of money ; and, subject to the term, and to the charges which might be raised upon the term, the limitations of the will were to the sons in tail, then to the daughters in tail ; and if no issue should be living at the death of the testator, then to Lady Castlecoote his wife for life, with remainder over to certain other persons.

He then gave certain legacies, some of which were directed to be paid at all events : some were made to depend upon the fact of his having no children at the time of his death ; some of those legacies were directed to be paid with interest to commence from the time of his death ; some of the legacies were to be invested for the purpose of securing an income to certain persons then in *esse*, &c. He then makes a provision in these terms : “ All the legacies hereby granted shall, from the “ time they respectively become payable, bear in- “ terest at 5 per cent., and be raised and paid ac- “ cordingly.” Then he gives a sum of money to a charity, and he gives 2000*l.* with interest at 5 per cent. to his wife Lady Castlecoote ; the residue of his personalty he gives in trust to pay his debts and legacies ; and if the same should be insufficient, he charged the estates comprised in the 500 years’ term with the payment of his debts and legacies ; and directed the trustees of the 500 years’ term to raise the same pursuant to the trusts vested in them for that purpose. Then he gave the residue of his personalty to his wife.


The difficulty in the case arises from the direction in that part of the will in which he provides for the payment of debts and legacies, that the

1837.

MILLTOWN

v.


TRENCH.

1837.

MILLTOWN
v.
TARNUM.

trustees shall, if the personalty is insufficient, raise the same after the death of his wife.

There are three different states of circumstances, which the testator appears to have contemplated ; and in order to arrive as far as it is possible at the true intention which the testator wished to be carried into effect, it may be proper to consider what would be the state of the property according to those various circumstances which might have occurred. He might have left several children, which is one of the events against which he provides ; or he might have left one only child who would have succeeded to the estate ; or that event might have taken place which it is clear he contemplated, and which did take place, namely, that of his dying without any children.

Taking the first of the various suppositions which the testator clearly had in his contemplation, namely, that of his dying, leaving several children, the effect of the disposition in that case would be, that the term of 500 years would be vested in the trustees. The duty imposed upon them in that case would be in the first place to pay 2000*l.* a year to Lady Castlecoote, then to raise the portions after the death of the wife ; for the period of raising the portions is postponed until after her death, in the same way as the raising money to pay debts and legacies is postponed until after the death of the wife. These portions for younger children are made payable at such times as the wife should direct, or to be paid at twenty-one, or marriage ; but not to be raised until after her death, unless she should otherwise direct. Then there is a provision for maintenance till twenty-one, or marriage ; and there can be no doubt, that



if there had been younger children, the real estate during the lifetime of the widow must have borne the charge of the maintenance, or interest by way of maintenance, for those younger children. Then, subject to those charges, and subject to the question whether the legacies and debts, or the amount necessary for the payment of debts and legacies, would also bear interest, the son was to be tenant in tail.

Now, if your Lordships could look to the result of the account, which, strictly speaking, I apprehend you cannot look to, we are told there would be found a considerable surplus; but your Lordships have a right to look to that which the testator clearly contemplated on the face of his will, namely, there being a surplus beyond those particular charges, for he makes the son tenant in tail subject to those charges. The son is tenant in tail of the estate, subject to the payment of 2000*l.* a year to his mother, the widow of the testator, subject to the provision for the maintenance of younger children; and also (if your Lordships should be of opinion, that the legacies and debts bear interest) subject to the amount necessary to be raised for the purpose of meeting that charge of interest. Now, either the legacies bear interest payable from year to year, or if interest be chargeable at all, it would be chargeable on the sum necessary for the payment of the legacies and debts, and would accumulate against the inheritance of the estate; but in the case supposed the inheritance of the estate would be vested in the same person who was to be in possession of the surplus rents and profits, subject to the charges: and your Lordships would hardly impute to the testator the intention that his

1837.


MILLTOWN
v.
TRENCH.

1837.

MILLTOWN

v.
TRENCH.

son was to be in possession of the income arising from the estate ; but that the interest on so much as was necessary to pay the debts and legacies should not be payable out of that income which the son was to be in possession of, but should be a charge accumulating during the life of his widow, against the inheritance vested in his son, which would be enlarged by the termination of the life annuity which the testator had given to his wife.

It is very important to look at this state of circumstances, although it never arose in point of fact, because we must see how the testator's supposed intention would operate under different circumstances which he appears to have contemplated under his will. If interest was payable at all (a subject to which I shall presently call your attention), I can hardly suppose a doubt to exist that the interest to arise from year to year upon the sum necessary to pay debts and legacies, would be to be paid out of the income of which the son would have been in possession as tenant in tail, and that it would not be a sum to accumulate against the enlarged inheritance at the period of his mother's death : yet upon the face of this will in this part, there is just as strong a prohibition against the trustees selling any portion of the estate, until after the mother's death ; as your Lordships find in that part of the will in which he directs the raising a sum of money for the payment of legacies and debts.

I have now called your Lordships' attention to one state of circumstances which the testator contemplated, and which, from the then state of his family, was likely to happen. Another event is that of there being one son. Then there would

be this difference, that the estate would not be charged or chargeable with the portions of younger children. The estate which the son would be in possession of during the lifetime of his mother, would be an estate subject to her jointure of 2000*l.* a year, but not to be diminished by any maintenance payable for the younger children.

There is one other state of circumstances which the testator evidently contemplated, which is that which did happen, namely, the event of his dying without any children. Now in the event of his dying without any children, the direction is that the widow shall be tenant for life in lieu of the son. The widow would be tenant for life, but subject of course to such charges as the testator had imposed upon that term, which in the first place he vested in the trustees. The difference then would be this:—the widow by the testator is put in the place of the son, as far as concerns the beneficial enjoyment: there are no portions payable to younger children; therefore there is no interest payable by way of maintenance for their support. The question is, whether the debts and legacies remain the same in all their qualities and incidents? If interest be payable out of the income of the estate for debts and legacies, upon the supposition of there being children, whether two children or only one, is it to be supposed, that the testator intended that when the interest of the widow was enlarged by the failure of those other objects, who, if they had existed, would have taken that which the testator intended for their benefit, the provision, which in the former case was made for the legatees and creditors, should be taken away?

1837.

MILLTOWN

v.

TRENCH.

1837.
MILLTOWN
v.
TRENCH.

This seems improbable. If, therefore, your Lordships are of opinion, that supposing there had been a son a tenant in tail, that son in possession of the tenancy in tail, subject to the jointure to the widow, would out of the surplus rents be bound to pay the interest becoming due upon the amount of the legacies and debts, it appears to me to follow, as an inevitable consequence, that your Lordships cannot impute to the testator the extravagant intention of taking away from the legatees, when the objects of the precedent trusts have failed, that which he intended they should have if there had been children, and younger children who would then have claimed against the estate.

Upon these various views of the testator's intentions, although the words which postpone the raising of the legacies are to be found on the face of the will, which certainly create extreme difficulty, it appears to me that the decree of the Court of Ireland has given the construction which best effects the intention of the testator. If interest is payable upon the amount necessary to pay the debts and legacies, in the other events contemplated, it is surely payable in the event which has taken place, namely, that of there being no children; and it appears sufficiently clear that it must have been payable out of the surplus rents if there had been any children, for the widow had only a jointure of 2000*l.* a year, the estate tail being vested in the son.

But it is argued, that no interest is to be paid upon these legacies, upon the ground that the period for raising the sum of money for the purpose of paying these legacies and debts being, by the terms

of the will, directed to be postponed till after the death of the widow.

The ground on which this argument is raised is, that interest is only payable on account of delay in paying that which is due and payable; and that, inasmuch as there is no personal fund out of which those legacies and debts can be paid, at least no fund adequate to the payment, the period at which they will become payable will, in point of fact, not arise till after the death of the widow; and that consequently, there being no delay beyond the proper period, no interest is payable upon the amount of the legacies and the debts.

That argument would apply, and would have great force and weight, if there had been no gift of a legacy independent of the direction to raise it out of the estate after the death of the widow; but there are substantive and distinct and independent gifts of legacies. The testator has given legacies, in the first place, without reference to the fund out of which they are to be paid; he has given legacies, some of which are in terms directed to bear interest from the day of his death, — others are directed to bear interest from the end of a year. Now all legacies, unless there is a direction to the contrary expressed in the will, are entitled to bear interest from the expiration of one year after the testator's death. All the legatees, therefore, under this will, where no specific time of payment is mentioned, are entitled, under the will, to receive a certain sum of money payable at the expiration of one year after the testator's death. It is part of the legacy. It is part of the bounty which he has given, that interest is to be calculated

1837.


MILLTOWN
D.
TRENCH.

1837.
MILLTOWN
v.
TRENCH.

for the benefit of the legatees from the time when the legacies are payable. The legacies were payable, by law, from the period of a year after the testator's death; and interest upon these legacies would constitute as much a part of the legacies as the principal money intended by the testator to constitute the legacy itself.

If that were not so, your Lordships must be aware that, in various cases which have occurred, in which legacies have been raised by the sale of a reversionary term, they never could have interest calculated upon them at all. Now, it is admitted at the bar, and it is clear upon the authorities, that interest is calculated although the term on which they are secured is a reversionary term. And in the case of *Codrington v. Foley*, cited at the bar, Lord Thurlow laid down, that it is no objection to interest being calculated upon legacies that the term is reversionary; that we are always to look at the intention of the testator appearing upon the face of the will; and if it thereby appears that interest is to be calculated upon the legacies, it is no answer to such a construction of the will, that the term, out of which legacies are to be raised, is a reversionary term. But the case of *Lyddon v. Lyddon*, which was also cited at your Lordships' bar, appears to me quite conclusive upon the subject, and is directly applicable to the present case. There the legacy was in words directed not to be raised until after the expiration of the life estate. But there was a term out of which the legacy was to be raised. That term, put into the hands of trustees for the purpose of raising the sum necessary to pay the legacies, was not a reversionary term, and Sir William Grant made some observations

as to what might have been the effect if the term had been reversionary. The case of *Codrington v. Lord Foley* decides that such a circumstance of itself is not decisive against the legacy being chargeable with interest. But in *Lyddon v. Lyddon*, the term being vested in the hands of trustees, although there was a direction not to raise the sum necessary for paying the legacy till after the death of the tenant for life, Sir William Grant decided that interest on the legacies was to be calculated from the end of one year after the testator's death.

Freeman v. Simpson follows the doctrine laid down in *Lyddon v. Lyddon*. In the former case, a legacy was directed to be paid out of the real and personal estate; the personalty being insufficient for that purpose, the Vice Chancellor decided that the legacy was to bear interest, although the fund appropriated for the payment, that is, the real estate, was a fund which could not be applied to the payment of the legacy.

Looking, therefore, at the various events which the testator contemplated—looking at the absurdity of holding that the interest is to be raised, and is to accumulate against the inheritance when the remainder-man should be in possession of the estate—and considering the authorities which have been cited upon this subject, though it is not perhaps possible to make every part of this will reconcileable with other parts, so as to do no violence to any other part of it, I think your Lordships will concur with me in the opinion which I have very distinctly formed, that you will be carrying the intention more certainly into effect by affirming the decree of the Court of Chancery below than you

1837.
 ———
 MILTOWN
 P.
 TALKCH.

possibly can do by any variation from that decree; and I therefore move your Lordships that the decree of the Court of Chancery be affirmed.

Lord Brougham. — I entirely agree in the view taken of this case by my noble and learned friend. In common with the other noble and learned Lords who heard this cause, I entertained very considerable doubt during one part of the argument, arising from that very remarkable provision, from which, indeed, the whole difficulty arises, that the legacies shall be paid “after the decease of his wife.” But, upon further consideration of this case, undoubtedly we felt that that difficulty could be removed, and that, upon the whole, the sound construction of this will, which is so inartificially penned, is that which has been put by the decision of the Court below, and therefore that this judgment ought to be affirmed. At the same time, I take for granted that this is not a case in which your Lordships would at all be disposed to give the costs of the appeal. There is no doubt there is quite difficulty enough to make the step that was taken of appealing justifiable.

Lord Wynford. — I agree with both of my noble and learned friends, that the decision of the Court below is a proper one; and it would be a melancholy thing if it was not an accurate decision. If the interest is payable now, but not to be raised till after the death of Lady Castlecoote, who, I believe, is still a young person, the consequence of reversing this judgment would be that this estate, which it was the intention of the testator should be possessed by Mr. Coote for the purpose of supporting him in his dignity, would, in fact, be worth nothing. It would be eaten out by the legacies.

On the other hand, if the interest was not payable the legacies would be worth nothing, for probably the legatees would not come into the possession of the legacies for fifty or sixty years. It is, therefore, desirable to come to the construction that the interest is payable now, there being a fund out of which it can be paid, namely, out of the rents of the estate; but that the principal sum for the satisfaction of the legacies is not to be raised.

All the cases which have been decided certainly have been to this effect: that where a legacy is given to be paid at a distant period, interest is generally given payable upon that legacy in the mean time. But that is not the case in the present instance, because these legacies are payable in the first instance out of the personal property. Probably the testator might have considered that the personal property was abundantly sufficient to discharge all these legacies. If it had been so, the legacies would have been payable within one year after the testator's death. Then the testator, in this very loose will (for I never saw a will more loosely drawn), says the legacies are to bear interest at the rate of five per cent. from the time when they are payable. When did he consider these legacies to be payable? I say he contemplated, in the first instance, that they would be paid out of the personal property. If there had been personal property sufficient, they would have been payable within a twelvemonth, and interest at five per cent. would have been chargeable in that case from that time. It appears to me, therefore, that the introduction of these words, whether they were introduced by accident or not, that the principal was not to be raised till after the death of his widow, should not postpone

1887.

WILKINS

TREASURER

the payment of interest on these legacies till after the death of Lady Castlecoote.

There is a very important circumstance, which, I believe, my noble friend relied on in giving judgment below; namely, that there is a fund in the hands of the trustees—that there is a power given to pay the interest out of the rents of the estate. The rents of the estate are in the hands of trustees from the moment of the testator's death; therefore I think it must have been the intention of the testator that the interest upon the legacies was to be paid out of that fund. If these words had not been introduced, upon which this question arises, I should have thought that the principal was to be paid within a very short period after his death. These words compelled my noble and learned friend opposite to introduce into his decree that which he was bound to introduce; that, although interest is payable from twelve months after the death of the testator, the principal is not to be paid off by the express words of the will, until after the death of Lady Castlecoote. It appears to me that this judgment pronounced in the Court below, by my noble and learned friend, is according to the true construction of this will as far as it is possible to find out what is the true construction of a will so ill drawn and so inconsistent. In a case of great doubt, where it is impossible to find out with certainty the testator's meaning, we must adopt that construction which is according to justice, which will preserve the interests of those for whom the testator meant to make an immediate provision, and preserve the estate for him who was to take the benefit of that estate after the death of Lady Castlecoote. I therefore concur in the opi-

1837.

MILLTOW

v.

TRENCH

nion of my noble and learned friends, that this appeal should be dismissed, but that, from the difficulties of the case and the great obscurity of the will, it ought not to be dismissed with costs.

Lord Plunkett. — This case has been so fully discussed by the noble and learned lords who have preceded me, that it is scarcely necessary for me to address any further observations to your Lordships upon the subject. To some of the proceedings in the Court below, however, I think it necessary shortly to call your Lordships' attention. It has been admitted, in the whole progress of this case, that, so far as the personal estate is concerned, the legacies which have been charged upon it do in their nature carry interest, and by the express terms of the will are directed to carry interest from one year after the death of the testator. Whether or not interest was properly payable out of those premises during the lifetime of Lady Castlecoote, it is quite clear that upon the death of Lady Castlecoote the whole arrear of interest which would accrue in the mean time would be a charge upon the inheritance. I advert to this part of the case, because in the course of the argument it was thrown out, upon the part of the Respondent, Mr. Eyre Coote, who is interested in the inheritance, that it now becoming material for him, for the first time, to ascertain whether the inheritance was so chargeable, your Lordships might, perhaps, be disposed to give him the liberty to lodge an additional appeal for the purpose of protecting the inheritance, in order to prevent the possibility of litigation. For this reason I think it necessary to call your Lordships' attention to the decree pronounced in this cause on the 20th of June, 1833.

CASES IN THE HOUSE OF LORDS

Mr. Eyre Coote, the father of the present Respondent, was the person, under the will of the said Lord Castlereagh, entitled to a life estate in these premises. His son, the present Respondent, is the person now entitled to the inheritance; but when the cause came to hearing, previous to the final decree complained of in June, 1833, an exception was raised by Mr. Eyre Coote, the then tenant for life, upon this very point; viz., that no interest was chargeable at all. He objected to the decree "that the sum of 31,239*l.* 19*s.* 1*d.* still remained due on foot of the unpaid debts and legacies of the said Eyre Tilson, Lord Castlereagh, for principal and interest up to and for the 11th day of June instant; whereas, by the terms of the will of the said testator, interest on the said pecuniary legacies, or some of them, could accrue only from the time at which the said testator had by his will provided that the same should be raised and paid out of the real and freehold estates; and the said Master ought to report the principal money only of the said pecuniary legacies to be due to the several persons entitled." That is the very point raised upon reading the first exception taken by Mr. Eyre Coote. Upon which it is resolved "that the said first exception be, and the same is, hereby overruled;" that very point was decided against him.

Now it is true that Mr. Eyre Coote, who raised the exception, was only tenant for life, and, therefore that would not have bound the inheritance if there was any ground now for raising this point by Mr. Eyre Coote. The tenant for life having died, the cause being revived against his son, the

present Mr. Eyre Coote, it was referred to the Master to see whether it would be for the benefit of the minor that he should be bound by proceedings against his father; and the Master having reported that it would be for the benefit of the minor that the several accounts and proceedings had in the original cause should be adopted on his behalf, the cause then came on to be heard on the 27th of June, 1835, and the decree now appealed from was then pronounced.

Having adverted to these proceedings for the purpose of shewing that no question can be now raised as to the liability of the estates, after the determination of the life estate of Lady Milltown, to the entire interest then remaining due from one year after the death of the testator, I shall only briefly state some of the grounds on which the decretal order now appealed from was pronounced. It appears to me clear that the testator contemplated two different events; the first was his dying, leaving issue by his then wife; and the second was his dying without leaving issue by her. In the first event, he gave her an annuity of 2000*l.* for her life, charged on the lands. In the second, he gave her an estate for life in the lands. In both events, he subjected the estates to certain legacies. In both he directed that the estate should not be liable to be sold for the payment of legacies till after the death of his wife. But in both it was evidently his intention, that the legatees should be entitled to interest on their legacies, and that the principal and accruing interest should be charged on the term of 500 years.

It has been argued with much ingenuity, by the counsel for the Respondent, that the postponement

1837.
MILLTOWN
v.
TRENCH.

if the raising of the principal of the legacies, until the death of the widow, was a mistake arising from the copying, into the part of the will which relates to the event of his dying without issue, the clause which could only have properly been applicable to the event of his leaving issue ; in which case all difficulty would have been removed. But, I conceive that I cannot take such a liberty with the express words of the testator. That condition has found its way into the will, and we must take it as we find it. But, though it is clear that the raising of the principal of the legacies was to be postponed till the death of the wife, I do not find any thing in the will which compels, or indeed warrants, the conclusion, that the payment of the interest was to abide the same event. So far as the personal estate was concerned, it is clear the principal, as well as interest, was payable immediately. So far as the real estate is concerned, it has not been alleged in the Court below — (only by the counsel for the Appellants here) — that it is not to be ultimately liable as well for the arrear of interest as for the principal on the legacies. The point has been, it is true, suggested by the counsel for the Respondent Eyre Coote, as one to which he might resort in the event of this decree being reversed ; but, for the reason which I have already stated, I am satisfied that such a point is not now open to him. The only real question is, whether the interest, which is clearly a charge on the term, is now payable. If there had been a son who would have become entitled to the estate, upon the death of the testator, subject to the annuity, that son would have been bound, as tenant in tail, to have paid the interest, though he would have been protected from

having his estate sold for the payment of the principal, until it was relieved from the annuity. There was a large surplus, as appears from the report in the cause; that surplus appears applicable to the purpose. There could have been no possible advantage to him from leaving the accruing interest to cut into his inheritance; and it would have been unjust to leave the legatees, many of whom had only a life interest in the legacies, to await the death of the widow.

It is further to be remarked that, on the construction contended for by the Appellant, even if there had been younger children of the testator, they would have been left without any provision for their present subsistence, from the time of their attaining twenty-one years, or marriage in the event of their being daughters. The only provision for such children is the provision for their maintenance; and there would be no provision in the event of their attaining twenty-one years, or, if daughters, after their marriage, if the construction contended for by the Appellant is the true construction. Now, if the mere postponement of the raising the principal would not have induced such consequences in the event of there being issue, can it have a stronger effect in the event of his leaving no issue? Is it to be supposed, that he intended a greater privilege against the payment of the interest in favour of his wife, than he had attached to it in case of his son? or that he meant to deprive the legatees of the benefit of his bounty in the one event, and not in the other? There is nothing, as it appears to me, to shew that the mere postponement of the payment of the principal necessarily induces such a consequence; and the authorities

1837.

MILLTOWN

D.

TRENCH.

~~There is~~ by the noble Lord on the woolsack
it is ~~now~~ directly the reverse. There may be a
~~great reason for the one~~, which would not apply to
the other. The falling in of leases, the existence
of ~~any circumstances~~ which would produce a per-
sonal inconvenience from an immediate sale.

There is the case of a term for years paramount to the estate devised to his wife, and charges for legacies made on it, in their nature carrying interest, and admitted to be such both as against the real and personal estates. What is to exempt the tenant for life from the ordinary obligation of keeping down the interest of charges affecting the inheritance? This is not like the case of a legacy which is not to vest in the legatee until a certain event happens. It is a legacy given absolutely and directly, and with interest, but the power of levying the principal out of one of the funds charged with it postponed to a future period. The authorities which have been cited on legacies payable in the event of attaining twenty-one, or of marriage, do not apply; nor have the cases, as to the power of raising out of a reversionary term, any application to the subject. This is not a reversionary term, nor could a reversionary term be carved out of it; it is a present and a paramount term, or nothing; and the case is, in my opinion, nothing more than the ordinary one of a tenant for life called on to keep down the interest of a paramount charge on the inheritance, that charge in its nature carrying interest. It would require an intention to the contrary, clearly applying to counteract this general rule; and there is not, in this case, any thing to warrant an inference that such was the intention of the testator, but, in my opinion, much to the contrary. I agree fully

in what has been thrown out by my noble and learned friends, who have gone before me, that this is a case upon which it was quite fit to take your Lordships' opinion. This will is a very inaccurate and ill-framed and perplexed instrument. After hearing the case very fully argued I did not arrive at the conclusion without difficulty and hesitation. I concur, therefore, in thinking that this is a case in which no costs should be given.

Lord Brougham. — The other noble and learned Lord who was present at the hearing of the Appeal entirely concurs in the same view of this case. He is prevented being present at this time by the circumstance of his not having heard one portion of the argument. He also entertained some doubts at one period of the argument, but those doubts were afterwards removed.

Judgment affirmed.

1837.

MILLTOWN
v.
TRENCH.

1837.

v.
HODGENS.

IRELAND.

(COURT OF CHANCERY.)

ANNE HODGENS, otherwise WALKER, by O'GORMAN MAHON, Esq., her next Friend, - - } *Appellant;*

THOMAS HODGENS, HENRY WALKER HODGENS, and THOMAS WALKER HODGENS, Minors, by the said THOMAS HODGENS, Esq., their Father and next Friend, - - - } *Respondents.*

H., an Irish barrister, having in the course of business become acquainted with the particulars of the fortune of W., a ward of the Court of Chancery, who was then at school, and of the age of thirteen years and a half, induced her to elope with him from a school where she had been placed, and a ceremony of marriage between them was performed. Having been attached and imprisoned for this contempt of the Court, H. petitioned the Court, and was released by an order, upon condition of abstaining from all intercourse with W., who was returned to school by order of the Court, and the marriage was declared null and void by proceedings instituted in the Ecclesiastical Court, under the direction of the Court of Chancery. Soon afterwards W. was again induced to elope from school, and passed a day and night in the house of H.; whereupon he was again imprisoned under the order of the Court, and W. was again sent to school. Having been again released upon his petition, under the same conditions as before, H., a third time, and forcibly, took W. from her school attendants, with whom she was walking, and eloped with her to France, where he remained cohabiting with her till she attained the age of twenty-one. After this period H. returned, and was again imprisoned for contempt. He then petitioned the Court, stating that he and W. were desirous of being married, and submitted to

1837.

HODGENS
v.
HODGENS.

settle the property of W. as the Court should direct. W. at the same time petitioned to be discharged from her wardship. Upon this latter petition the Court made no order; but upon the former, ordered H. to lay proposals before the Master, which he did accordingly. A legal marriage was then solemnised, under the direction of an order of Court; and, according to the proposals brought in by H., the real property of W. (then the wife of H.) was to be conveyed in trust for the separate use of W. for her life, remainder to the first and other sons, &c. in the ordinary course of settlement, with a limitation to the use of the appointees by will of the wife, and in default thereof to the use of the wife and her heirs. The residue of the personalty was to be vested in trustees, to pay the proceeds to the wife for her separate use during her life, and, after payment of the costs of the suits pending, remainder to the children of the marriage as the wife should by deed or will appoint, and in default of appointment, equally among them, with a power reserved for the wife to appoint one fifth of the said residue of the personal estate to the husband, &c. These proposals, and a draft settlement pursuant thereto, were approved by the Master's report; but, on application to the Lord Chancellor to confirm the report, he refused to do so, on the ground that part of the property was in litigation and unascertained. In the mean time, by order of the Court, the interest and dividends of the property were paid to the wife on her personal receipt; and upon the termination of the suit respecting the real estate in her favour, and by order of Court, she was admitted into receipt of the rents as her separate estate.

In March, 1834, the wife eloped from her husband; but having returned in April, 1834, she presented a petition, reciting an order, by which her husband had been directed to join her in levying fines of her freehold property, which had been done, and praying that he might execute the marriage settlement (which had been approved of by the Master), with such alterations, in consequence of events which had happened since the proposals were made, as the Master might think necessary, and that such proceedings might be without prejudice to the existing orders as to her receipt of the proceeds of the estates; and thereupon it was ordered that the Master should review his report and amend the draft of the settlement (among other things), limiting the uses of the fine which had been levied, and by excluding the husband from any present, future, or contingent interest in the property, real or personal, except in the one fifth of the personalty; and in

1837.

HODGENS
v.
HODGENS.

the mean time the interest, rents, &c. were, under the order, paid to the separate use of the wife.

Two children were born after the legal marriage. In May, 1834, the wife again eloped from H., her husband, and committed adultery; and he recovered damages, and had judgment in an action for criminal conversation.

In January, 1835, a petition was presented by the husband, on behalf of the infant children, praying that, in proceeding under the order of reference before stated, the Master might amend the draft settlement, by providing out of the income of the property of the wife during her life a competent sum to be paid to the husband for the maintenance, &c. of the children during their minority, and after attaining twenty-one years for their support and advancement in life; and that in the mean time the order for payment of the interest &c. to the wife should be suspended. The Master of the Rolls made an order of reference to the Master upon this petition; and, upon consent, it was directed that 700*l.* half-yearly should be paid to the wife.


Against this order the wife appealed to the Lord Chancellor (Sugden), who reversed the order of the Master of the Rolls; this last-mentioned order, upon further appeal by the husband to the Lord Chancellor (Plunkett), was reversed.

The appeal to the House was against the last order of reversal, which was reversed.

THE Appellant, by proceedings had in 1810, became a ward of the Court of Chancery, in Ireland. In 1820, being at school, and of the age of thirteen years and a half, she was induced, by the contrivances of the Respondent Thomas Hodgens, to elope with him; and on the 19th of March, 1820, a form of marriage was celebrated between the Appellant and the Respondent Thomas Hodgens. Shortly after this transaction Thomas Hodgens, and others, who had acted in collusion with him, were committed to prison by order of the Court, and the Appellant was sent back to school. On the 4th of January, 1821, Thomas Hodgens petitioned the Court, and obtained his release upon

entering into his own recognizance with securities in a sum of 2000*l.*, upon condition not to hold any intercourse with the Appellant without the leave of the Court. On the 21st of February, 1821, the Appellant was again induced to abscond from school, and to pass a day and night in the house of the Respondent, Thomas Hodgens; and on the 24th of February he was, by order of the Court, again committed to prison for this new contempt. But on presenting a new petition, on the ground of ill health, he was again discharged, by order of the 30th of May, 1821, upon his own recognizance, on condition not to hold communication or correspondence with the Appellant. In pursuance of an order, bearing date the 29th of January, 1821, made in the matter of the minor, a suit was instituted in the Consistorial Court of the Archbishop of Dublin to annul the marriage; and by a decree pronounced in the cause, bearing date the 10th of December, 1822, the marriage was declared null and void. Of this proceeding the Appellant was not informed; but, having been again sent back to school, was afterwards forcibly taken from her governess while she was out walking, and eventually carried by the Respondent, Thomas Hodgens, to France, where he lived with her in a state of concubinage until she attained her full age of twenty-one years, in September, 1827.

In November, 1827, the Appellant petitioned the Court to be discharged from the wardship of the Court; and on the 28th of November, 1827, Thomas Hodgens presented a petition to the Lord Chancellor of Ireland, setting forth the circumstance aforesaid; and further stating that Thomas Hodgens was willing to execute such deed of settle-

1837.

 HODGENS
 v.
 HODGENS.

1837.
HODGENS
v.
HODGENS.

ment as to the property of the Appellant as the Lord Chancellor should direct, and to submit himself in every respect to the jurisdiction of the Court of Chancery, and praying that the Court would make such order of reference to the Master or otherwise as his Lordship should deem most suited to the honour and interests of the Appellant, he the said Thomas Hodgens undertaking to do and perform whatever should be ordered by his Lordship in that behalf.

The matter of the petition having been heard, and Roderick Connor, Esq., one of the Masters of the Court, and guardian of the fortune of the Appellant, appearing by counsel on the 28th of November, 1827, it was ordered, (Thomas Hodgens undertaking to be forthcoming to abide any order which the Court might see fit thereafter to make relating to the matters alluded to in the said petition,) that Thomas Hodgens should proceed to have a legal marriage duly solemnised between him and the Appellant, then late a minor: and it was further ordered that thereupon Thomas Hodgens should proceed to lay proposals before William Henn, Esq., the Master in the said matter, for a proper marriage settlement to be entered into under the circumstances in respect of the fortune of the said late minor: and it was further ordered that the said late minor's guardian, Roderick Connor, Esq., should take special care as to the due conduct of the matters comprised in the said order: and it was further ordered that the matter of a certain petition of the said Anne Hodgens to be discharged from the wardship of the Court of Chancery, which had been theretofore presented to his Lordship, should stand over till further order.

A marriage was accordingly solemnised between Thomas Hodgens and the Appellant; and thereupon Thomas Hodgens laid before the Master proposals for a settlement of the fortune of the Appellant.

The Master by his report, bearing date the 8th of February, 1828, found— “ That a legal marriage had been, in obedience to the order, duly had and solemnised between the said Thomas Hodgens and the said Anne Hodgens; and he further found that the said Thomas Hodgens had laid before him proposals for a settlement of the fortune of the said Anne Hodgens, whereby he had proposed that the freehold estates of which the said Anne Hodgens was then or should at any time thereafter during her coverture become seised should be conveyed to trustees, in trust to and for the sole and separate use of the said Anne Hodgens, wholly independently of the said Thomas Hodgens, and without the same being subject to his debts; and that the rents, issues, and profits thereof should be paid to the said Anne Hodgens upon her own receipt, notwithstanding her coverture; and that, after the decease of the said Anne Hodgens, the rents of the freehold estates should be settled to the use of the first son of the said Anne Hodgens by the said Thomas Hodgens, and the heirs male of the body of such first son; and, in default of such issue, then to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said Anne Hodgens by the said Thomas Hodgens, severally, successively, and in remainder, one after another, as they and every of them should be in priority of birth and seniority of

1837.

HODGENS
v.
HODGENS.

1837.

HODGENS
v.
HODGENS.

“ age ; and, for default of such issue male, to the
“ use of the daughter or daughters of the said
“ Anne Hodgens by the said Thomas Hodgens,
“ if more than one, as tenants in common in tail ;
“ and, in default of issue of the said marriage, then
“ to the use of such person and persons for such
“ estate and estates, and to and upon such uses,
“ trusts, intents, and purposes as she the said Anne
“ Hodgens (notwithstanding her coverture) by her
“ last will and testament, to be signed and publish-
“ ed by her in the presence of and attested by three
“ or more credible witnesses, should limit and ap-
“ point ; and in default of such appointment to the
“ use of the said Anne Hodgens, her heirs and
“ assigns for ever.

“ And as to the personal property to which the
“ said Anne Hodgens was then, or at any time
“ thereafter during her coverture should become,
“ entitled, it was thereby proposed that the same
“ should be vested in trustees, in trust by and out
“ of the said property to pay all such costs as had
“ been or might be necessary for the prosecution
“ of the several suits and proceedings which had
“ been instituted on behalf of the said Anne Hod-
“ gens, and were thereafter mentioned, and such
“ costs (if any) as the Court might decree her or
“ the said Thomas Hodgens to pay in any suit or
“ suits then instituted on her behalf, or in which
“ she was then a defendant, and which are like-
“ wise thereafter stated ; but in the mean time,
“ and until such sums should be paid, upon trust to
“ pay the interest, income, and proceeds of the said
“ property unto the said Anne Hodgens, to and
“ for her sole and separate use and benefit, free
“ from the control, debts, or engagements of the
“ said Thomas Hodgens ; and after the payment of

“ the said costs, then, as to the residue of the said
 “ personal estate, in trust to pay the interest, in-
 “ come, and proceeds thereof unto the said Anne
 “ Hodgens for and during her life, to and for her
 “ sole and separate use and benefit, free from the
 “ control, debts, or engagements of the said Thos.
 “ Hodgens; and, from and after the decease of the
 “ said Anne Hodgens, in trust for the child and
 “ children of the said Anne Hodgens by the said
 “ Thomas Hodgens, in such shares and proportions
 “ (if more than one) as the said Anne, alone, not-
 “ withstanding her coverture, should by any deed,
 “ or by her last will and testament in writing, to
 “ be executed in the presence of and attested by
 “ two or more credible witnesses, direct and ap-
 “ point; and, in default of such appointment, then
 “ in trust for such child and children, equally to be
 “ divided amongst them, if more than one, share
 “ and share alike as tenant in common; and, in case
 “ there should be but one such child, then in trust
 “ for such one only child, with power however to
 “ the said Anne Hodgens, by any will to be by her
 “ executed in the presence of and attested by two
 “ or more credible witnesses, to appoint any por-
 “ tion of the said personal property, not exceeding
 “ one fifth part thereof, to the said Thos. Hodgens,
 “ in case he should survive her; and with power
 “ also to the said Anne Hodgens, in case she
 “ should survive the said Thomas Hodgens,
 “ and leave any issue of the said marriage who
 “ should become entitled to any benefit under
 “ said settlement, to appoint the interest of a cer-
 “ tain proportion of the said personal property, not
 “ exceeding 20,000*l.*, to and for the use of any
 “ after-taken husband, and to appoint the principal

. 1837.

HODGENS

v.

HODGENS.

1857.

“ to and amongst any children which the said
 “ Anne Hodgens should have by any such after-
 “ taken husband; but in case the said Anne Hod-
 “ gens should not leave any issue by him, who
 “ should become entitled to any benefit as afore-
 “ said, then in trust for such person and persons,
 “ and in such shares and proportions, as the said
 “ Anne Hodgens should, in the lifetime of the said
 “ Thomas Hodgens, by her will, or, after his death,
 “ either by her will, or by any deed to be by her
 “ executed in the presence of and attested by two
 “ or more credible witnesses, direct and appoint;
 “ and in default of such appointment then in trust
 “ for the said Anne Hodgens, her executors, ad-
 “ ministrators, and assigns.”

The Master, by his report, further found, “ that
 “ he had approved of the proposals, and of a draft
 “ of a settlement settling and assuring the said
 “ property pursuant thereto, but that he had post-
 “ poned the engrossment of the said draft until his
 “ Lordship’s further order should be made upon the
 “ said report.”

The Master, by his report, further found,
 “ that there was then depending in the Court
 “ of Chancery a suit instituted on the part of
 “ the said Anne Hodgens, during her minority,
 “ against Anne Blake, alias Walker, the widow and
 “ administratrix of the late Henry Walker, the
 “ father of the said Anne Hodgens, in order to
 “ ascertain the rights of the said Anne Hodgens
 “ as the only legitimate child of the said Henry
 “ Walker; and that there was then in Court to the
 “ credit of the said cause the sum of 1836*l.* 9*s.*
 “ government 3½ per cent stock, and 128*l.* 11*s.*
 “ cash; but which said sums were subject to certain

1837.


HODGENS

S.
HODGENS.

"claims of creditors of the said Henry Walker,
"which had not then yet been finally adjudicated
"upon and decided."

The Master further found, "that there was
"then likewise depending in the said Court, a
"suit instituted on the part of the said Anne
"Hodgens, during her minority, against Elizabeth
"Wheeler and Lydia Carr, administratrixes of the
"late Thomas Walker, Esq., the paternal uncle of
"the said Anne Hodgens, in order to ascertain
"the rights of the said Anne Hodgens as one of
"the next of kin of the said Thomas Walker; and
"that there was then in Court, to the credit of the
"said cause, the sum of 13,465*l.* 16*s.* government
"3½ per cent. stock; the sum of 22,407*l.* 12*s.* 6*d.*
"stock of the governor and company of the bank
"of Ireland; the sum of 538*l.* 12*s.* 2*d.* govern-
"ment 4 per cent. stock; and 1131*l.* 3*s.* 2*d.* cash;
"and that it was admitted by the defendants in the
"cause that Anne Hodgens was entitled to the said
"several sums." And the Master further found,
"that the said several sums, together with cer-
"tain freehold property yielding a profit rent of
"153*l.* 3*s.* 10*d.* a year, were to be the subject of the
"said settlement, and that the same were in the
"said draft thereof fully recited and set forth."

The Master further found, "that there was
"also then depending in the said Court of Chan-
"cery a suit instituted against the said Anne
"Hodgens by one Henry Walker, claiming as the
"heir at law of the said Henry Walker, the father,
"and Thomas Walker, the uncle, of the said Anne
"Hodgens, to be entitled to the freehold estates,
"of which they, the said Henry Walker and
"Thomas Walker, respectively died seised; and

1837.

“ claiming also, as one of the next of kin of the
 “ said Henry Walker and Thomas Walker, to be
 “ entitled equally with the said Anne Hodgens to
 “ a distributive share of the personal estate of
 “ which the said Henry and Thomas Walker re-
 “ spectively died possessed : all which several suits,
 “ the said Master found, were the suits for the
 “ cuses whereof it was proposed to provide, as in
 “ the said report, and in the said draft of the set-
 “ tlement, is stated and provided.”

Upon the report being made, a petition was presented by Thomas Hodgens to the Lord Chancellor, praying that the report be confirmed by an order of his Lordship; but it appearing to his Lordship that several persons had set up claims to the property of Anne Hodgens, which was to be the subject of the settlement, and that the same were then undetermined, his Lordship refused under such circumstances to make any order to confirm the report.

By an order, bearing date the 2d day of August, 1837 made in the said matter, and in the several causes in the title of the said order mentioned, the Accountant-general of the Court of Chancery in Ireland was ordered to draw on the Bank of Ireland in favour of Anne Hodgens, and upon her own separate receipt, for the dividends and interest due and to accrue due on the funds in Court, to the credit of the several causes mentioned in the order, constituting part of the property to which she was entitled, and which was to have been put into settlement pursuant to the proposal made by Thomas Hodgens.

In pursuance of the order, Anne Hodgens continued to receive the interest and dividends of

the funds on her own separate receipt until the time hereinafter mentioned.

The claims of Anne Hodgens to the property, which was to be made the subject of the marriage settlement, were, for some years subsequent to the pronouncing of the order, contested, on the alleged ground of her illegitimacy, in several suits instituted in the Court of Chancery in Ireland. But her right to the freehold property of Thomas Walker was ultimately established; and by a final decree, bearing date the 30th day of April, 1833, made in the cause of Thomas Hodgens and Anne Hodgens, otherwise Walker, his wife, against Elizabeth Wheeler and Lydia Carr, Thomas Hodgens and Anne Hodgens, in right of the said Anne, were decreed entitled to one third part of the personal property of the aforesaid Thomas Walker, her uncle, deceased.

By order, bearing date the 10th of December, 1833, made in the several causes in the title of the order mentioned, the Accountant-general of the Court of Chancery was directed to transfer from the credit of the first and second causes therein mentioned to the credit of the third cause therein also mentioned, and to the separate credit of Anne Hodgens, the sum of 5846*l.* 12*s.* 2*d.* government old 3½ per cent. stock, 538*l.* 12*s.* 2*d.* government new 3½ per cent. stock, and 22,407*l.* 12*s.* 6*d.* bank of Ireland stock. And it was further ordered that the Accountant-general should, in execution of the order of the 2d of August, 1828, draw from time to time on the bank of Ireland in favour of Anne Hodgens, on her separate receipt, for the dividends which should accrue due on the said several funds.

1837.

HODGENS

v.

HODGENS.

By an order made in the cause of Hodgens and Wife against Wheeler and Carr, and bearing date the 13th of February, 1829, it was ordered that the receiver in the said cause be discharged from the receipt of the rents of the freehold estate therein mentioned (and which, pursuant to the Master's report of the 8th of February, 1828, were to be put into settlement, as therein set forth); and that Anne Hodgens be at liberty to enter into the receipt of the said rents as her separate estate; and, in pursuance of the last-mentioned order, Anne Hodgens continued in the receipt of the rents as her separate estate.

The Respondents, Henry Walker Hodgens and Thomas Walker Hodgens, were the only issue of the marriage of Thomas Hodgens and Anne his wife, which was solemnised pursuant to the order of the 28th of November, 1827. The Respondent Henry Walker Hodgens was, at the time of the elopement of Anne Hodgens, as hereinafter mentioned, of the age of four years or thereabouts, and the Respondent Thomas Walker Hodgens of the age of three years.

In the month of March, 1834, differences arose between Thomas Hodgens and Anne his wife; and on the 4th of March, 1834, Anne Hodgens eloped from the residence of her husband, and continued absent therefrom until the 18th of March, when, by the persuasion of mutual friends, she was induced to return. But the differences between Thomas Hodgens and Anne his wife still continuing, Anne Hodgens, on the 16th of April, 1834, presented a petition to the Lords Commissioners for the custody of the great seal of Ireland, stating, among other matters,

that by an order made in the said matter on the 30th of April, 1834, on the petition of Anne Hodgins, it was ordered that Thomas Hodgins should join the said Anne Hodgins in levying fines of the freehold property of Anne Hodgins, and that such fines had been, in pursuance of the order, accordingly levied; and praying that Thomas Hodgins be ordered to execute the marriage settlement whereof the draft had been approved of by the Master, as found by his report of the 8th of February, 1828, with such alterations therein with respect to the amount of the petitioner's property (if any) as the Master might certify to be proper and necessary and in consequence of the orders referred to in the petition or any of them, and that it might be referred to the master to inspect the draft of the settlement and the said orders, and to certify whether any and what alteration should be made in the said draft in consequence of the said orders, and that the Master be also directed to approve of proper trustees to be named in the settlement, and that such proceedings might be had without prejudice to the aforesaid orders of the 2d of August, 1828, 13th of February, 1829, and 10th of December, 1833. Whereby it was ordered that the dividends and proceeds of the personal estate be paid to Anne Hodgins for her separate use, and that she should be at liberty to receive the rents of her freehold property as her separate estate.

The matter of the petition having come on to be moved before the Master of the Rolls, by counsel on behalf of Anne Hodgins, and counsel for Thomas Hodgins and for the Respondents having been heard on the petition, it was, on the 22d of May,

1837.

HODGINS

v.
HODGINS

1837.

HODGENS

v.
HODGENS.

1834, ordered by his Honour the Master of the Rolls; that the Master in the said matter be at liberty to review his report, bearing date the 8th of February, 1828, and the draft of the marriage settlement therein mentioned; and, in reviewing the same, it was further ordered, that the Master do report the funds to be thereby conveyed to and vested in trustees, having regard to the said orders, bearing date respectively the 2d of August, 1828, the 13th of February, 1829, and the 10th of December, 1833, and to the sum of 265*l.* 3*s.* 5*d.* old government 3½ per cent. stock, and 51*l.* 1*s.* 2*d.* specified in the petition, and also in relation to any other funds to be included in and vested in trustees by the said settlement, &c. And that the Master do amend the draft of the said settlement, by declaring thereby and limiting the uses of the fines levied in the then last term of the freehold property mentioned in the said report: And the Court having regard to the contempts committed by Thomas Hodgens, and especially to those mentioned in the orders, bearing date the 1st of April, 1820, the 24th of February, 1821, the 30th of May, 1821, and the 15th of May, 1822, declared that the Master, in settling and approving of the draft of the said settlement, ought to provide, by effectual provisions and limitations, to exclude the said Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of Anne Hodgens his wife, or any part thereof, save and except so far as the draft of the settlement, as mentioned in the report of the Master, enables Anne Hodgens, by virtue of the power therein contained, to make an appointment in the events therein mentioned in favour of Thomas Hodgens, and in the manner therein pro-

posed, of a portion of the personal property not exceeding one fifth thereof; and it was ordered accordingly : And it was further ordered that the said Master do amend the draft of the settlement, as mentioned in the report, which provides, “ That
 “ in case the said Anne shall not leave any issue
 “ by Thomas Hodgens, who shall become entitled
 “ to any benefits as provided in the draft then in
 “ trust for such person or persons, and in such
 “ shares and proportions as Anne shall, in the life-
 “ time of Thomas Hodgens, by her will, or, after
 “ his death, either by her will, or by any deed, to
 “ be by her executed in the presence of and at-
 “ tested by two or more credible witnesses, direct
 “ and appoint, and in default of such appointment,
 “ then in trust for Anne Hodgens, her executors,
 “ administrators, and assigns,” by providing that, in default of such appointment, the personal property be limited in trust for Anne Hodgens and her next of kin to the express exclusion of Thomas Hodgens, his executors and administrators : And it was further ordered that the Accountant-general do continue to act in pursuance of the order, bearing date the 10th of December, 1833, and continue to draw in favour of Anne Hodgens for the dividends which should accrue due from time to time upon the funds therein mentioned, and thereby ordered to be placed to her separate credit, and on her separate receipt, until further order : And that Anne Hodgens be at liberty to continue to receive the rents and profits of the freehold property as her separate estate until further order.

By the order of the 30th of April, 1834, recited in the petition of Anne Hodgens, whereon the order of the 22d of May, 1834, was pronounced,

1837.

HODGENS

S.

HODGENS.

1837.

HODGENS

v.

HODGENS.

it was ordered that Thomas Hodgens and Anne his wife should proceed to levy a fine, during the then present term of the real estates of Anne Hodgens, to such uses as should be declared in and by such deed of settlement to be finally settled and approved of by the Court, and to be executed as the Court should order touching the property of Anne Hodgens; and in the mean time, and until such settlements should be executed, it was further ordered, that the fine do enure to the use of Anne Hodgens, her heirs and assigns.

On the 19th of May, 1834, Anne Hodgens again eloped from the residence of Thomas Hodgens, and carried on a criminal intercourse with Anthony Patrick Mahon, with whom afterwards she continued to cohabit.

In consequence of such misconduct, Thomas Hodgens brought an action at law against Anthony Patrick Mahon for criminal conversation with his wife, and obtained a verdict with damages, and final judgment therein.

The interest and dividends of the funds payable to Anne Hodgens, on her separate receipt, under the orders of the 2d of August, 1828, and the 10th of December, 1833, amounted annually to the sum of 2343*l.* 3*s.*; and the rents and profits of the freehold estates which Anne Hodgens received, pursuant to the order of the 13th of February, 1829, amounted to the yearly sum of 154*l.* 18*s.* 6*d.*

On the 12th of January, 1835, a petition was presented to the Lord Chancellor of Ireland, by Thomas Hodgens, on behalf of the infant Respondents, whereby it was prayed, that in proceeding under the order of reference of the 22d of May, 1834, the Master do amend the draft

of the settlement, by providing out of the income of the property of Anne Hodgens during her life a competent sum to be paid to the Respondents' father, Thomas Hodgens, for the maintenance, clothing, and education of the Respondents during their minority, and likewise a competent sum to be paid to the Respondents' children, after they shall attain the age of twenty-one years, for their support and advancement in life; and that he should further amend the said draft, in reference to the disposition of the residue of the income of the property of Anne Hodgens during her life, in such manner as his Lordship should deem meet under the circumstances of the case; and that in the mean time the execution of the orders of the 2d of August, 1828, the 10th of December, 1833, the 22d of May, 1834, and the 13th of February, 1829, so far as the same empowered the said Anne Hodgens to receive on her separate receipt, and as her separate estate, the interest and dividends, rents and profits, of the funds and freehold property respectively, be superseded, and that Anne Hodgens be restrained from receiving the same; "whereupon
"it was ordered, by the Master of the Rolls, that
"the matter of the said petition do stand over to
"be moved on the then next Wednesday: And it
"was further ordered, that payments under the
"said orders be stayed in the mean time until
"further order."

On the 26th of January, 1835, an application was made on behalf of the Respondents in the matter of the said late minor, and in the several causes mentioned in the title of the notice of the said application, that in proceeding under the aforesaid order of reference, bearing date the 22d of

1837.

HODGENS
v.
HODGENS,

1837.

HODGENS

v.

HODGENS.

May, 1834, the Master might amend the draft of the settlement, bearing date the 8th of February, 1828, by providing out of the income of Anne Hodgens a competent sum, to be paid to Thomas Hodgens the father of the children, for their maintenance, clothing, and education, and a competent sum to be paid them after they should attain the age of twenty-one years ; and also in reference to the disposition of the residue of the income of the property of the said Anne Hodgens during her life. Whereupon it was ordered by his Honour the Master of the Rolls, it appearing to the Court that the order, bearing date the 28th of November, 1827, was made by the then Lord Chancellor against the said Thomas Hodgens, then and still in contempt, under the three orders for attachments for distinct contempts, in relation to the said Anne Hodgens as a ward of the Court, bearing date respectively the 1st of May, 1820, the 24th of February, 1821, and the 18th of May, 1822, upon his submission, stated in the said order, to execute such deed of settlement as his Lordship might direct, and to submit himself in every respect to the jurisdiction of the Court, and that the jurisdiction was exercised, and the said order made, in relation to the marital rights of the said Thomas Hodgens in the fortune of the said Anne Hodgens, as against a person liable to the jurisdiction of the Court under the said contempts ; and that the said order did not import and could not be deemed to be taken as in the nature of articles of agreement previous to the marriage mentioned in the said order ; And it further appearing to the Court, from the affidavit of the said Thomas Hodgens, filed the 7th of January, 1835, that having presented a pe-

tion to confirm the Master's report under the said order, bearing date the 28th of November, 1827, in relation to the draft of the said settlement, the then Lord Chancellor declined to make any order thereon for the reason stated in the said affidavit; and it further appearing that the draft of the said settlement has never been approved of by any order of the Court, and that by order, bearing date the 22d of May, 1834, grounded upon the petition of the said Anne Hodgins, it was ordered that the Master should be at liberty to review his said report, bearing date the 8th of February, 1828, and the draft of the marriage settlement therein mentioned, and therein to make amendments and variations therein specified, beneficial to the said Anne Hodgins and her collateral relatives: And it further appearing to the Court, that the said Henry Walker Hodgins and Thomas Walker Hodgins, the infants and only children of the said Thomas and Anne Hodgins, since their marriage, under the said order, bearing date the 28th of November, 1827, were without any present provision for their education and maintenance, and without any provision after their full age for their subsistence and advancement, during the lifetime of the said Anne Hodgins: And it further appearing to the Court, that before any draft of the settlement should now be approved of, regard should be had to the state of the facts and family as they then existed, and to the occurrences which had taken place, and especially to the events and circumstances which had occurred since making the said order, bearing date the 22d of May, 1834, it was ordered that it be referred to William Henn, esq. the Master, in proceeding under the said order, bearing date the

1837.



HODGINS


v.

HODGINS.

1897.


HODGENS
&
HODGENS.

22d of May, 1894, further to enquire and report whether the Respondents had been maintained out of the separate estate of Anne Hodgens up to any and what period, and whether in reviewing and approving of a draft of the settlement under the last-mentioned order, it would be necessary and proper, having regard to the circumstances in life of Thomas Hodgens, and to the consideration of his ability to maintain and educate the Respondents according to their future expectations and property, and afterwards to provide for them during the lifetime of the Appellant, that any and what yearly sum should be limited, payable half yearly out of the dividends of the fortune of the Appellant to the Respondent's father, the said Thomas Hodgens during his lifetime, and afterwards to trustees for the Respondents in the event of the Appellant surviving the said Thomas Hodgens, during her lifetime, for the purpose of providing for the maintenance and education of the Respondents during their minority, and afterwards for providing a suitable subsistence and advancement for them during the lifetime of Anne Hodgens, Thomas Hodgens undertaking to enter into and execute the said settlement with such proper covenants as the Court shall approve, for the purpose of binding Thomas Hodgens yearly and every year, to pass and file an account before Roderick Connor, esq., the Master in the third cause, each Michaelmas term, for the yearly sum, so to be paid to him; and after allowing all just disbursements and allowances for the maintenance and education of the Respondents, to vest the balance in government $3\frac{1}{2}$ per cent. stock, and transfer the same to the separate credit



in the third cause of the Respondents or of the survivor of them, and also to concur in all necessary acts for the continuing such provision as shall be made during the lifetime of Anne Hodgens, if she shall survive the said Thomas Hodgens : And it was further ordered that the declarations and directions in the order, bearing date the 22d of May, 1834, be varied so far as the same are inconsistent with the said order : And accordingly his Honour was pleased to declare that the Master, in settling and approving of the draft of the settlement, ought to provide by effectual provisions and limitations to exclude Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of Anne Hodgens, or any part thereof save the provision therein referred to the Master, to report for Thomas Hodgens, for the benefit and in trust for the Respondents, and save and except any benefit which he might derive under any appointment to be executed under the power of appointment, proposed to be reserved to Anne Hodgens, to appoint to Thomas Hodgens, in the manner therein proposed, a portion of the personal fortune not exceeding one-fifth : And Thomas Hodgens, on behalf of himself and the minors, consenting that the order to stay payments be discharged upon the terms of the payments to Anne Hodgens, under the orders bearing date the 10th of December, 1833, and the 22d of May, 1834, being reduced, pending the reference therein mentioned, and until further order ; it was further ordered that the order bearing date the 12th of January, then instant, be discharged : And it was further ordered that the Accountant-general of the Court

1837.

HODGENS

v.

HODGENS.

557.

do in execution of the orders bearing date the 10th of December 1833, and the 22d of May, 1834, draw out of the dividends of the funds mentioned in the said orders then standing to the credit of the third cause, entitled in the Accountant-general's books, Thomas Hodgens and Anne Hodgens, otherwise Walker his wife against Elizabeth Wheeler and Lydia Carr (and to the separate credit of Anne Hodgens), as an *interim* provision in favour of Anne Hodgens, or such person as she should appoint by any writing as her separate estate, for the sum of 700*l.* and so half-yearly, for the like sum of 700*l.* out of the dividends when received from time to time, until further order : And it was further ordered, that the residue of the said dividends be half-yearly invested with the approbation of the Master, in government 3½ per cent. stock, and transferred to the credit of the third cause : And his Honour was pleased to reserve further order until the return of the report ; and it was further ordered, that the said *interim* consent be without prejudice to the right of either party to appeal as to the rest of the said order as they might be advised, and to any order which might be made on such appeal as to such *interim* payment.

(On the 21st of February, 1835, the Appellant presented a petition to the Lord Chancellor (Sugden) praying that the order of the Master of the Rolls, bearing date the 26th of January, 1835, be set aside, and that the order of the Master of the Rolls, bearing date the 12th of January, 1835, so far as the same would be re-established, by setting aside the order of the 26th of January, 1835, might be also set aside, and that the rights and interests of the petitioner in and to the dividends and all other her property or fortune, real or per-

sonal, be restored to the same condition in which the same were placed before the making of the order of the 12th of January, 1835: Whereupon it was ordered by the Lord Chancellor, that the order of the 12th of January, 1835, and 26th of January, 1835, be set aside, and it was further ordered that the Accountant-general do draw on the Bank of Ireland in favour of Anne Hodgins for the balance of the dividends which became due on the 5th of January, 1835, and which she was restrained from using by the aforesaid orders; and it was further ordered that the Accountant-general do also from time to time draw on the Bank of Ireland in favour of Anne Hodgins on her separate receipt, for the dividends which should from time to time thereafter accrue due on the government and bank stock mentioned in the orders of the 10th of December, 1833, and 22d of April, 1834, pursuant to the directions contained in the said orders respectively.

On the 22d day of April, 1835, the Respondents caused notice to be served of an application to the Lord Chancellor (Plunkett), by way of rehearing of the motion on which the order, bearing date the 21st of February, 1835, was made, "that the said "last-mentioned order be set aside or varied, and "that the order of the Master of the Rolls, bearing "date the 26th of January, 1835, be confirmed." Whereupon by an order bearing date the 1st of June, 1835, it was ordered by the Lord Chancellor that the order, bearing date the 21st of February, 1835, be, and the same was thereby reversed; and it was further ordered that the reference theretofore directed by the Rolls' order of the 26th of January, 1835, be proceeded on; and in

1837.

HODGINS

P.

HODGINS.

1837.

HODGENS
v.
HODGENS.

proceeding on the reference by the said order directed, it was further ordered that the Master do enquire and report particularly the nature, amount, and value of the freehold properties of Anne Hodgens, and also of the personal property ; and it was further ordered that the Master do also enquire and report whether the same, or any and what part thereof had been at any time and when reduced into possession by Thomas Hodgens, her husband, and if so, under what circumstances.

The appeal to the House of Lords was against this order.

For the Appellant, Mr. *Wigram* and Mr. *Shadwell*.

For the Appellant, it was argued, that the property of the Ward was under the control of the Court ; that the conduct of the husband brought him within the jurisdiction, and being flagrant was a ground for severity ; that the order for settlement of the property was made upon the undertaking and proposal of the husband ; that the settlement approved by the Master was a gift by the husband to the wife, founded upon the undertaking, and could not be recalled ; that subsequent events could not be regarded nor alleged as ground for alteration in the settlement to affect the interests of the wife ; that the children could only claim through the marital right which had been surrendered by the undertaking and proposals ; that the order of the 2d of August, 1828, could not be discharged, not being made until further order, but as final ; that the report adopting the proposals, though not confirmed, had been acted upon. The authorities cited were *Millet v. Rowse*,

7 Ves. 419; *Stackpole v. Beaumont*, 3 Ves. 89; *Long v. Long* and *Austen v. Halsey*, 2 Sim. and S. 119. and 123. note; *Leeds v. Barnardiston*, 4 Sim. 538; *Ball v. Coutts*, 1 V. and B. 292; *Murray v. Lord Elibank*, 10 Ves. 84; *Steinmetz v. Hulthin*, 1 Gl. and J. 64; *Like v. Beresford*, 3 Ves. 506; *Grey v. Kentish*, 1 Atk. 280; *Field v. Sims*, *Trevor v. Trevor*, 1 P. W. 622; 6 Anne c. 16. s. 1., and 2 Geo. 4. c. 76. s. 23; and see *Chassaing v. Parsonage*, 5 Ves. 14; *Sidney v. Sidney*, 3 P. W. 269; *Lloyd v. Williams*, 1 Mad. 450; *Fenner v. Taylor*, 2 Russ. and M. 190.

1837.

HODGENS

v.

HODGENS.

For the Respondent, Mr. *Knight* and Mr. *Lynch*.

No settlement of the fortune of Anne Hodgens has been executed, and the report, bearing date the 8th of February, 1828, whereby the Master approved of the draft of an intended settlement, has not been confirmed by any order of the Court. The report and the draft of the settlement were varied by the order of the 22d of May, 1834, and that order was obtained on application of Anne Hodgens, who acquiesced in and took benefit under it; and Anne Hodgens thereby admitted the jurisdiction of the Court to vary the report and settlement. It is argued, that subsequent events are not to be regarded. But the rule is not, nor can be so, as in cases of reversions falling in or bankruptcy of the husband.

By the order bearing date the 30th of April, 1834, obtained on the application of Anne Hodgens, Thomas Hodgens and Anne Hodgens are directed to levy a fine of the freehold lands therein-mentioned, to such uses as should be declared by the deed

1837.

HODGENS

v.

HODGENS.

of settlement, to be finally settled and approved of by the Court; and Anne Hodgins acquiesced in the order and levied a fine pursuant thereto, and the right of the Court to direct such settlement to be executed as under the circumstances of the case should be deemed fit, notwithstanding the report of the 8th of February, 1828, and the draft of the settlement thereby approved of, and the draft settlement under the order of the Court was sent back to the Master to be reviewed generally.

Thomas Hodgins having intermarried with Anne Hodgins, after she had attained her full age of twenty-one years, without any settlement of the property having been executed, he became entitled by virtue of his marital right to the entire personal estate of Anne Hodgins, and to the absolute ownership thereof; and Thomas Hodgins having on the pronouncing of the order of the 28th of November, 1827, undertaken to execute such settlement as the Court should approve of, and the Court having no jurisdiction over the property of Anne Hodgins, but by reason of the undertaking and by reason of the contempt committed by Thomas Hodgins, in relation to her during her minority—and Anne Hodgins not having, before her marriage with Thomas Hodgins, and after she had attained her full age of twenty-one years, stipulated for any settlement of her property whatsoever, it was competent for the Court under the circumstances to allocate a portion of the property of Anne Hodgins for the maintenance and education of the Respondents during their minority, and for their subsistence and advancement after they should attain their full age, during the life of the Appellant.

The facts and circumstances of the case, and more especially the misconduct of the Appellant,

and her desertion of the Respondents her children, called for such an allocation of her property, and the Court exercised a just and proper discretion in making the same.

Stevens v. Savage, 1 Ves. jun. 154; *Bathurst v. Murray*, 8 Ves. 74; *Pearce v. Crutchfield*, 17 Ves. 48; *Huguenin v. Baseley*, 14 Ves. 273; *Re Henry*, note to this case in *Lloyd and Gould*, p. 142; and see *Birkett v. Hibbert*, 3 My. and K. 227; as to misconduct of wife, *Ball v. Montgomery*, 2 Ves. jun. 191; *Carr v. Eastabrook*, 4 Ves. 146; *Bullock v. Menzies*, 4 Ves. 698; see also *Wright v. Morley*, 11 Ves. 12.

1837.

HODGENS

v.
HODGENS.

The Lord Chancellor.—There was a case argued at your Lordships' bar some time since, in which a person of the name of Anne Hodgens was Appellant, and Thomas Hodgens and Henry Walker Hodgens and Thomas Walker Hodgens were Respondents. It was an appeal from an order of the Court of Chancery in Ireland, which was dated the 26th of January, 1835, which was an order discharging a former order of the Lord Chancellor of Ireland, which former order had reversed an order of the Master of the Rolls in Ireland, by which it was directed that there should be a reference to the Master, to inquire whether it was necessary that any and what yearly sum should be paid out of the dividends of Mrs. Hodgens's fortune to Mr. Hodgens during his life, and afterwards to trustees during her life, in the event of her surviving him, for the maintenance of the children, during their minority, and for their advancement afterwards, and that, in the mean time, until the Master should have made his report, the Accountant-

14th March,
1837.

1837.



HODGENS

v.

HODGENS.

general should draw in Mrs. Hodgens's favour upon the funds in Court, to the amount of 700*l.* half yearly; and that the remainder of Mrs. Hodgens's separate income should be vested in government securities, and transferred to the separate credit of the infant children.

This is a case that comes before your Lordships undoubtedly under circumstances of great difficulty with regard to authority. In the first place, an order was made by the Master of the Rolls in Ireland, by which he directed an inquiry to be made by the Master in the terms, or to the effect, which I have read. The case then came by way of appeal from that order before Sir Edward Sugden, when he was Lord Chancellor of Ireland, and he reversed the order of the Master of the Rolls. That order of the then Lord Chancellor of Ireland, which reversed the order of the Master of the Rolls, then came before the present Lord Chancellor of Ireland, who was of opinion that the order of the Master of the Rolls was correct, and, being of that opinion, he reversed the order of his predecessor, and so, in point of fact, gave effect to the previous order of the Master of the Rolls.

The question raised is, as to the income of a married woman, who had been a ward of the Court of Chancery in Ireland, and who had been married to the Respondent Thomas Hodgens, under very peculiar circumstances, which in the outline, at least, I think it right to state to your Lordships. It appears that the Appellant Anne Hodgens, at the age of thirteen years and a half, was taken away from the persons who were her guardians, under the authority of the Court of Chancery, by the Respondent Thomas Hodgens, and that a ceremony of marriage was gone through; a ceremony

of marriage which afterwards turned out to be invalid; because, in point of fact, that marriage was afterwards set aside by the Ecclesiastical Court. She was then a ward of the Court of Chancery, and had been so from her earliest infancy. Mr. Hodgens, who had committed this contempt of Court by so marrying an infant ward of the Court, was committed for his contempt; he applied for the indulgence of the Court, and, after some time, he was released from his confinement upon his entering into recognisances, in a very large sum of money, to abstain from any further interference with the infant.

That was in the year 1820, but in the year 1821 it appears that he again got possession of the infant, and he was again committed for his contempt of Court, and he was again unfortunately, upon another application for the indulgence of the Court, released from his confinement, and in the year 1822 a third elopement took place. In the mean time however, namely, in the year 1822, a proceeding in the Ecclesiastical Court having been directed by an order of the Court of Chancery in Ireland to take place under that proceeding, the marriage, which had taken place in the year 1820, was declared to be null and void. From the time of this third elopement, which was in the month of May, 1822, until the year 1827, (at which time the infant having attained her age of twenty-one years, there was a probability that by his submitting to the Court, and doing something like justice to this infant, he might hope to obtain some portion of her property) it appears that the Respondent Thomas Hodgens lived with the infant abroad, without going through the form of any ceremony of marriage, he being perfectly well

1837.
HODGENS
v.
HODGENS.

1837.
—
HODGENS
v.
HODGENS.

aware that the former marriage had been declared null and void ; but there is a great probability that that fact was suppressed and kept back from the knowledge of the unfortunate child.

A more gross proceeding than this can scarcely be stated or conceived, gross in point of morality, and exceedingly insulting to the Court, of which this person was a ward ; and therefore the extremity of proceeding which a Court of Equity is entitled to adopt, to vindicate its authority and to punish the offender against its jurisdiction, and to secure to the Ward all that benefit and all those privileges which it has the means of securing, ought undoubtedly to be exercised against this person, who has violated his duty as a man towards this young lady, and who has been guilty of this gross contempt towards the Court.

The infant having attained her age of twenty-one years, Hodgens returned to Ireland, and submitting himself, in the usual form, to the jurisdiction of the Court, and undertaking to abide by such order as the Court might make with respect to her property, applied to the Court, by petition, praying that he might be at liberty to have the marriage celebrated with the infant.

It appears by an affidavit, which he has brought forward in support of his case, that a course was adopted (which I hope never again to see adopted by a Court of Equity), the Court permitting the marriage to take place before those steps which were proper to secure the interest of the Ward had been taken, and which the Court ought, in the first place, to have done. It is stated, by this affidavit, that the marriage was ordered by the Court to be solemnised, but that, previous to such marriage, an


interview took place between Anne Walker, now Anne Hodgens, and Mr. Roderick Connor, who had been appointed a guardian to this infant, at which she stated her readiness and willingness to have this marriage celebrated, and that, accordingly, it was celebrated: the affidavit then states, that soon after the said interview a ceremony of marriage was duly had and solemnised between this deponent and the said Anne Hodgens, in obedience to the said order; and, thereupon, the deponent, further in obedience to the said order, laid before William Henn, Esquire, a proposal for a settlement of the property of the said Anne Hodgens; which said proposal was in conformity to an intimation, previously given by the said Master, of the terms of settlement, of which, if proposed, he would approve. He then says, that, the Master having approved of the said proposal, a draft of a deed, in conformity with the said proposal, was prepared; and having been perused and amended by the said Master, and submitted to and approved by the said Roderick Connor, Esquire, and his counsel, as guardian to the said Ward, it was fully approved by the said Master, and certified by him accordingly.

It appears that the infant was entitled to some real estate in possession, and to a very considerable personal estate, but that the title both to the real and personal estate was in litigation in three different suits, then pending in the Court of Chancery in Ireland; it was, therefore, obviously very difficult to make an actual settlement of the property being in the state which I have described. The proposals were such as might have been expected, being made in pursuance of an intimation

1837.


HODGENS
v.
HODGENS.

1837.


HODGENS
v.
HODGENS.

previously given by the Master in a private communication, and in the terms upon which he had expressed that he should approve of the settlement; and, indeed, a person so offending as Mr. Hodgens had offended could not hope that any other terms would be accepted than such as would divest him of all interest in the property of the Ward; and, accordingly, those proposals were, that the real estate should be settled to the use of the infant for her life, and after her death upon the issue of the marriage, and that the personal estate should be settled in the same manner, except only with a power reserved to the wife by will to appoint any portion of the property, not exceeding one fifth, to Mr. Hodgens, in case he should survive her; therefore it was in her power to settle one fifth part of the personal estate upon her husband if she so pleased. It then provided that the children should be entitled to the whole of the personal estate, with the exception of this one fifth if she should so settle this one fifth; and in the event of there being no children then the property was to go, in trust, for such persons as Mrs. Hodgens, either in the lifetime of Mr. Hodgens or after his death, should, by her will or by any deed, direct or appoint, and in default of appointment, in trust, for Mrs. Hodgens, her executors, administrators, and assigns; obviously, therefore, intending to exclude the husband from any direct benefit, in point of right, to any of the property which had been the property of the Ward.

When this report of the Master came before the Lord Chancellor of Ireland for confirmation, it appeared to him that from the state of the property it was not possible, as indeed it was not expedient,

to act upon it at that time. It is stated in both the cases, and therefore we may assume it to be the fact, that those were the reasons and the only reasons which induced the Court to abstain from directing the Master to have a settlement actually executed in the terms of the proposal. The property being in litigation, it was impossible to ascertain the exact amount of it; in point of fact, it was in that state in which it could only be put into trust, and it was for those reasons only, which the Court could not disapprove of, that the Master abstained from having the settlement executed according to the proposal.

As these causes proceeded, the title and property of this young lady became ascertained, and three several orders were made in strict conformity with that proposal, which was approved of by the Master in the year 1828. The personal property having by that time, by the decision of the cause, been ascertained to be the property of the Ward, who then had attained her age of twenty-one years, an order was made bearing date the 2d of August, 1828, by which the income arising from the property was directed to be held for the sole and separate use of Mrs. Hodgens. In the month of February, 1829, the title to the real estate having become ascertained, and the title to the real estate being decided in her favour as against the other person who claimed it, the receiver of that estate was discharged, and she was let into possession of the income of the real estate for her own separate use. In December, 1833, another order was made for the payment of the then existing fund constituting her property, for her sole and separate use; and Mr. Hodgens was a party to all

1837.



HODGENS

v.

HODGENS.

1837.

HODGENS

v
HODGENS.


these proceedings, either as petitioning with his wife, or as a party consenting to the order pronounced, and therefore unquestionably he must be considered as being bound by the orders of the Court, in consequence of his being a concurring and consenting party in the directions of those several orders. We have him therefore proposing to divest himself of all interest in the property of his wife, and then we have three several orders applying the property to her sole and separate use, which was in direct conformity with the proposal that was made to the Master for the settlement.

In the year 1834, in order to give effect and as preparatory to the final settlement of the real estate, it became necessary to make an order of the Court of Chancery, to direct Mr. and Mrs. Hodgens to join in levying a fine to such uses as should be finally settled and approved of by the Court, and accordingly an order in that year was pronounced for that purpose.

In the month of May in the same year, the estate of the infant having varied so much from the time that the Master had made his report in the year 1828, a petition was presented to the Court of Chancery by Mrs. Hodgens, praying that the necessary alterations might be made in the proposed settlement, and that measures might be taken for the purpose of carrying that into effect; nothing prayed by that petition appears to have been at all at variance with the proposal that was carried in and approved by the Master. But it appears that the Court interfered; and the Court seeing that in a certain event of there being no children, an event, however, not at all likely to occur, as there were at that time two children—but in a certain possible

event happening, there was a provision that the property should go to the executors or administrators of Mrs. Hodgens, and as in the event of her death without children, her husband surviving her might fill the character of her administrator and so become entitled to the property—being of opinion, that in no possible event Mr. Hodgens ought to have the chance of becoming the administrator of the estate, the Court upon its own suggestion, and not upon the application of Mrs. Hodgens, directed the Master to review that part of his report and to provide, that in no possible event should Mr. Hodgens be entitled to any portion of her property. The order is in these terms :—“The Court having
 “regard to the contempts committed by the
 “said Thomas Hodgens, and especially to those
 “mentioned in the orders bearing date 1st of
 “April, 1820, the 24th of February, 1821, 30th
 “of May, 1821, and the 15th of May, 1822, did
 “declare that the said Master in settling and ap-
 “proving of the draft of the said settlement, ought
 “to provide by effectual provisions and limitations
 “to exclude the said Thomas Hodgens from any
 “present, future, or contingent interest in the
 “property, real or personal, of the said Anne Hod-
 “gens, his wife, or any part thereof, save and ex-
 “cept so far as the draft of the said settlement as
 “mentioned in the said report of the Master
 “enables the said Anne Hodgens, by virtue of the
 “power therein contained, to make an appointment
 “in the events therein mentioned in favour of the
 “said Thomas Hodgens, and in the manner therein
 “proposed of a portion of the said personal pro-
 “perty, not exceeding one-fifth thereof; and ac-
 “cordingly it was ordered, that the said Master, in

1837.


 HODGENS
 v.
 HODGENS.

1837.

HODGENS

v.

HODGENS.

“ settling and approving of the said draft of the
“ said settlement, should exclude the said Thomas
“ Hodgens from any participation, benefit or ad-
“ vantage, right or interest, in the said property of
“ the said Anne Hodgens, real or personal, pre-
“ sent, future, or contingent, save under an ap-
“ pointment to be made as aforesaid, by the
“ said Anne Hodgens.” And accordingly it
was further ordered, that the Master do amend the
said draft of the said settlement as mentioned in
the said report, which provides, “ That in case the
“ said Anne shall not leave any issue by the said
“ Thomas Hodgens, who shall become entitled to
“ any benefits as provided in the said draft, then
“ in trust for such person or persons, and in such
“ shares and proportions as the said Anne shall in
“ the lifetime of the said Thomas Hodgens, by her
“ will, or after his death, either by her will or by
“ any deed to be by her executed in the presence
“ of and attested by two or more credible witnesses,
“ or by any deed, direct and appoint, and in de-
“ fault of such appointment then in trust for the
“ said Anne Hodgens, her executors, administra-
“ tors, and assigns ; by providing that in default
“ of such appointment, the said personal property
“ be limited in trust for the same Anne Hodgens,
“ and her next of kin, to the express exclusions
“ of the said Thomas Hodgens, his executors and
“ administrators.”

In the month of January, 1835, a petition was presented in the name of Mr. Hodgens and his two infant children, praying that out of the income which had been from the year 1828 appropriated to the separate use of Mrs. Hodgens, a provision might be made of a sum to be paid to him for the

purpose of maintaining his two children. It was stated, (and of that unfortunately there is now no doubt, that this unfortunate Ward of the Court, who had been so taken from its care and protection at the age of thirteen and a half by this Mr. Hodgins, and with whom he had at least from the year 1822, and till the year 1827, cohabited, knowing that there was no marriage, and she probably not being aware that such was the case,) that this unfortunate connection had ended in adultery committed by the wife; and upon the ground of the adultery so committed by the wife, and of the separation that had then taken place, Hodgins alleged that the two children had been left entirely to his charge, and that he had no means of his own by which he could provide for the children; he, therefore, applied to the Court, and prayed that he might have out of her income a sufficient and proper sum allowed to him for the maintenance of those two children.

That application came on before the Master of the Rolls in Ireland on the 12th of January, 1835. The effect of the first order was to suspend the payment of the income to Mrs. Hodgins, which she had become entitled to under the preceding orders; and on the 26th of January the petition came on for hearing, and an order was made upon that petition by the Master of the Rolls, by which he referred it to the Master to inquire what sum should be allowed to Mr. Hodgins for the maintenance of the children during their continuance in their minority, and for their advancement when they came of age; and in the mean time he directed that the 300*l.* payable every half year out of the income which had been directed by the former


1837.

HODGENS

v.

HODGENS.

1837.


HODGENS
v.
HODGENS.

order to be paid to Mrs. Hodgens should be continued to be paid to her, and that the rest should accumulate and be carried to the account of the children.

That order was the subject of appeal in the Court of Chancery in Ireland. The appeal came on for hearing on the 21st of February, 1835, and ended in that order being discharged. There was a subsequent rehearing before the present Lord Chancellor, who, being of opinion that the Master of the Rolls had properly exercised his jurisdiction in making the order of the 26th of January, ordered that the order reversing the order of the Master of the Rolls be discharged; in effect, therefore, setting up the order which the Master of the Rolls had made, and reversing the intermediate order.

It is fortunate that the order of the Master of the Rolls recites the various grounds upon which it is supported. It states that the draft of the settlement had never been approved: it states that alterations had been made in that draft of the settlement in the month of April, 1834, upon the application of Mrs. Hodgens; and it states that the children were without provision after 1821 for their subsistence, during the lifetime of their mother. It then states that the subsequent events which had taken place justified the Court in altering the settlement as approved of by the Master in the year 1827.

Now we are to consider those various grounds in the order in which they stand: there are two questions which your Lordships have to consider; first, whether the children have a right, as against their mother, to have any portion of her income

appropriated to their maintenance ; and secondly, whether Mr. Hodgens, who is the party applying, together with his children, can have any such right as against her separate income.

1837.
HODGENS
v.
HODGENS.

The order recites that the draft had never been approved. Now it is proved that the Master's report had never been confirmed, but it is proved that it had never been confirmed only on account of the peculiar situation of the property ; that the Court had for this reason abstained from directing the settlement to be executed ; but the Court had, from the year 1828, when the Master made his report on every occasion when the matter came before it, acted upon the proposition of settling the property as settled by the Master ; it had by three successive orders directed the whole income of the property to be paid to Mrs. Hodgens, independently and separately from her husband, to be paid as against Mr. Hodgens, who was permitted to marry this Ward upon the faith pledged by him to the Court that he would abide by such order as the Court might make, and abstain from asking for a participation in her income during his life, which is the only subject that your Lordships have to consider. I apprehend, therefore, that the circumstances which have taken place are quite conclusive against the right of Mr. Hodgens, and that nothing which might subsequently arise could entitle him to come to the Court and ask for any order giving him any benefit in the estate of his wife which the previous order and the settlement approved by the Master had not given him.

I say that he was bound by the proceedings ; but if not, how infinitely more strongly was he bound by the conduct that he himself had pursued. In

1837.


HODGENS
v.
HODGENS.

cases of this description, where men seek to get advantages for themselves by obtaining possession of wards under the jurisdiction of a Court of Equity, and by so doing are guilty of contempts against their jurisdiction, the Court will seldom, if ever, permit them to profit by their misconduct or to enjoy any part of the property, to obtain which has probably been the motive of their proceeding. But here was the case of a person without any property of his own, offering to settle none, guilty of repeated contempts, and guilty of misconduct toward the Ward, which would excite the energies of a Court of Equity against him, to prevent his deriving any benefit from his misconduct; and, therefore, whether we look to the transaction itself or to the individual, I apprehend that nothing could justify the Court in relaxing the order which had been previously made, or to let the guilty party profit from his own wrong.

But it is said that Mrs. Hodgens had herself obtained an alteration in the terms of the proposed settlement by the order of April, 1834. In the first place, it does not appear that the alteration attempted to be made in the order was at the suggestion of Mrs. Hodgens: the question was, whether the husband was not excluded; and the Court might very well, if it found any omission in the Master's report, give more effect to it, and recommend to the Master to take more care in carrying into effect the proposals of the husband to exclude him. It was not for the purpose of altering the settlement, but to carry it more fully into effect, and prevent the possibility of his deriving any benefit from his wife's property. It was consistent with his own proposition and with

the intention of the Court, who directed that all the property at that time available should be paid over to the separate use of the wife; but it appears to be the act of the Court itself, seeing that that object had not been sufficiently provided for by the limitations of the settlement as drawn. But supposing that nothing had been erroneous, by no possibility could the alteration of the settlement be considered as a circumstance to support or make it proper that the order for which he applied should be made, unless that order could be properly supported upon its own merits.

The third ground undoubtedly raises a question, I will not say of difficulty, in point of authority, but a question requiring very grave consideration, inasmuch as it is that point which has given rise to these contradictory orders: it is, that the children were without provision; and being without provision, the Master of the Rolls thought that there was jurisdiction in the Court of Chancery to provide for them during the life of their mother, and for their advancement after the death of the mother, out of her income. In cases either where the husband has been guilty of contempt in marrying a ward, or where he has not been guilty of such contempt, if a Court of Equity has jurisdiction over the property of the ward, it undoubtedly, in making settlements, constantly and almost uniformly, I may say, provides for the interests of the children. The case we have now to consider is where the husband has been guilty of a gross contempt, and where the settlement to be made and the objects to be provided for by that settlement are to be considered with reference to the situation in which he, the husband, stands as respects him-

1837.



HODGENS

v.

HODGENS.

1887.

HODGENS

v.

HODGENS.

self and the property of the Ward, with regard to whom he has been guilty of an offence by marrying without the consent of the Court.

The equity of the children is not an equity to which they are in their own right entitled. In making the settlement of the wife's property, the interests of the children are always attended to, because it must be supposed to be the object, and it is the duty of the Court in carrying that object into effect, to provide for those whom the mother of the children would be anxious to provide for; but, as between the mother and the children, I know of no authority for saying, that the Court has jurisdiction to take from the mother that which the Court has given to the mother, as against the right of the husband for the purpose of creating a benefit to the children. That the children have no equity of their own, that it is only the equity that they obtain through the means of the consent of the mother, is sufficiently clear when I call to your Lordships' recollection the fact, that if the mother, having attained the age of twenty-one, comes into Court, and consents that the property shall be paid over to the husband, that the Court will permit it to be paid over without reference to the interests of the children; but in no instance are the children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the mother whose property it is, and as between the children of the marriage, in such a way as may be thought

for the interests of the family. But the question is, whether the children have any right of their own against their mother, to deprive her of that income which is given to her by a settlement, though not actually executed, yet in the hands of the Master at the time when the party thought proper to submit to the jurisdiction of the Court.

I therefore consider the application made to the Master of the Rolls, either as made on behalf of the husband, in which case, I am sure it would not have been attended to by any branch of that Court for a single moment, though he was joined with the children, and claiming on behalf of the children, or on behalf of the children. If made on behalf of the children, it would be much to be desired that such order could be made in the unfortunate situation of the children of such parents: the acknowledged wickedness of the father, and the wickedness of the mother — (whether that is to be attributed to the original misconduct of the husband it is no part of your Lordships' duty to enquire) — but the misconduct of both parents places these children in the most lamentable situation; and one cannot be surprised, that the anxiety of the Courts should have been evinced, if consistent with the rules of the Court of Equity, to secure to these children the means of maintenance, independently of either of their parents. But your Lordships are not at liberty to give way to these feelings, nor to depart from the established rules of Courts of Equity in administering the property of their wards; I do not feel that a Court of Equity has a right, under the circumstances of the case, to interpose on behalf of the children against the decree, which their mother had obtained by means of the

1837.

HODGENS

v.

HODGENS.

CASES IN THE HOUSE OF LORDS


837.
DORNS
v.
DORNS.


exercise of the jurisdiction of the Court, against the marital rights of the husband. The property had by his concession, and by his consent, by arrangement entered into in the year 1828, become the separate property of the mother ; the children may want even the necessaries of life ; they may want the means of proper education ; the law does not throw on the mother the duty, the legal obligation, (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children ; and I with great reluctance, looking at the situation of those children, feel myself bound to state to your Lordships my opinion, that the order as made by the Master of the Rolls was not consistent with the established practice of the Courts of Equity ; and that that order, therefore, and the last order, ought to be reversed, affirming the intermediate order, setting aside the order of the Master of the Rolls.

Lord Wynford. — My Lords, I cannot add any thing to the very luminous observations of my noble and learned friend ; I entirely concur in what he has stated. Your Lordships have heard of the misconduct of both those parents : it is due to this unfortunate woman to say, that whatever misconduct may be attributed to her now, the original misconduct was with the husband. Your Lordships have heard, that when she was thirteen years and a half old, he was committed for contempt of the Court in having procured possession of her person ; he apologised to the Court, and they being unwilling to keep him in confinement, released him on his promising not to have intercourse with her : he afterwards again got possession of her person and carried her out of this country ; kept her for

five years in France, and there kept her in a manner abundantly sufficient to degrade her mind and to lead her into the misconduct now truly imputed to her. But your Lordships, sitting judicially, have nothing to do with that question. You are called upon to decide whether according to law, as it is administered in Courts of Equity, your Lordships can take away from a ward without her consent any part of her property for the maintenance of the children of the marriage. I am bound to say, as my noble and learned friend has said already, that by no law existing in this country can a woman be bound to maintain her children, her husband being alive; and if that were not the law, the sort of maintenance which she would be compelled to afford to her children, would not be that which is asked by this application and is conceded by this order; for according to this order, the woman's property is not only to be applied for maintenance suitable to the station of these children of which the law knows nothing, but also to make a provision for them upon their coming of age. The mother is not bound to comply with such an order. The policy of the law of this country has thought it best to leave such provision to the law of nature, to leave both the father and the mother to the free exercise of their own feelings. But it is argued, that you can get at the property in consequence of the contempt of the husband. That would be a strange mode of administering justice, and contrary to common sense as well as to equity. It is argued, however, that the right to the wife's property passed, by the act of marriage, to the husband. That such was the situation in which the property stood the instant the woman married, that

1837.


HODGENS
v.
HODGENS.

1837.

HODGENS
v.
HODGENS.

the personal property then passed to the husband, unless protected by some settlement. But in this case your Lordships have heard, from the very able statement of my noble and learned friend, that the husband had expressly consented to give up this right, and that consent had been acted upon by the Court, and this unfortunate woman was prevailed upon to consent to a subsequent marriage in consequence of that consent, and to give up her conjugal rights. After the manner in which she had been treated in France, deprived almost of the necessaries of life, constantly beaten and ill-treated, it was not likely that she should consent to marry him if she did not retain the dominion over her property; so that if she had not any controul over his affections, she, at least, might have some over his interests; and there is no doubt that she would not have so married, unless the husband had given his consent, upon which the Court acted. The order, for the reason given by my noble and learned friend, was never perfectly completed, but it was, in part, acted upon by the Court; for the income of the property, which is very large, was directed to be paid over to the separate use of the wife — the husband never, at any after-period of his life, touched a single shilling of it.

I speak with deference upon this subject, because it belongs to a branch of the administration of the law with which I have never been connected, but in which your Lordships have the assistance of my noble and learned friend, eminent for his knowledge in every branch of the law, and particularly in that branch by which this case must be decided. I believe that, in equity, that which ought to be done and that which is agreed to be done is con-

sidered as actually done. Is it possible to say, that this is not actually and completely done in equity, when this man obtained possession under an engagement to assign his interest over, and when, in consequence of that engagement, this woman consented to become his wife, and particularly, afterwards, when orders were made, from time to time, to assign for her separate maintenance the whole property of this fund? Must it not be considered that that arrangement is completely confirmed as much as if the Chancellor had given his solemn sanction to it, and that the husband is completely divested of this property? Your Lordships, therefore, by affirming this decree would be taking from the wife a part of her property to relieve the husband from the burden which, immediately and reasonably by law, belongs to him; at all events, the burden of the maintenance of the children falls, in the first instance, upon the husband: the husband comes forward; he places before your Lordships his own delinquencies, and then says, "Though, in consequence of these delinquencies, you have a right to proceed immediately against me, you should only proceed nominally against me, — you have the power over the property of my wife, — take from my wife her property, — apply that property which is taken from her and which I was prevented from having, in consequence of my contempt of the Court, to relieve me from the burden which is, by the law, immediately cast upon me."

We do not know whether he is or not able to sustain these children without any relief from this property. But the taking the property of the woman to maintain her children is against the

1837.

HODGENS

v.

HODGENS.

1837.

HODGENS
v.
HODGENS.

law; and it is still further against the law, to apply the property for a maintenance suitable to their condition in life; for the condition in life of those children is, that they are children of parents, one of whom possesses a very considerable property, but the other has nothing. I say, that the law, under no circumstances, would compel the wife to maintain the children, especially not by taking advantage of the circumstance of the delinquency of her husband.

But I hope that when your Lordships shall have disposed of this case, according to the law, this lady will still recollect that there is another law, by which she is bound,—the law of God and nature, which will compel her, suitably, to maintain those children which she has brought into the world. We have to decide this case according to the law, although it might have been desirable that the order could have been in part supported, so that some security for the maintenance of the children might have been obtained. The order must be dismissed altogether, as it appears to me, for the reasons which have been better given by my noble and learned friend than I can hope to give them. It is impossible for this House to sustain that order—nay, I do not wish to sustain it to the full extent. We have heard that “hard cases make bad law.” This is an extremely hard case,—but it would be making bad law,—it would be depriving parents of that right of property which, in my opinion, ought ever to be maintained, if your Lordships affirmed this order. It is better to leave that to a Higher Power than even to the power of the House of Lords. I concur, therefore, with my

noble and learned friend in the opinion that this order must be reversed.

I should state to your Lordships, also, that I am authorised by my noble and learned friend Lord Brougham to say, that he entirely concurs in this judgment.

Judgment reversed.

1837.

HODGENS

v.

HODGENS.

1837.

LATIMER

v.

NEATE.

ENGLAND.

(COURT OF EXCHEQUER.)

EDWARD LATIMER, - - *Appellant* ;
 WILLIAM NEATE, - - *Respondent*.

In 1824, N. sued out execution upon a judgment obtained by him in 1818, in an action upon a bond executed by M. to N. in 1815. The levy was made upon goods in the possession of M. Upon the seizure, the goods were claimed by L. as his property, and he, upon action, recovered a verdict against the sheriff. The goods continuing in the possession of M., in 1833, N. again sued out execution upon his judgment; but the sheriff, at the instance of N., by whom he was indemnified, made a return of *nulla bona*. Whereupon, in February, 1834, M. brought an action against the sheriff for a false return.

In 1835, N. filed a bill in the Exchequer against L. and M., stating the facts before-mentioned, charging that the assignments of the goods in question were made by M. to L. since the year 1824, and without consideration, and while M. was indebted to N. upon the bond and judgment, and that M., ever since such assignments, had continued in possession of the goods, and that the defendants had schedules thereof which they ought to set forth. The bill further charged that there had been pecuniary dealings between the defendants M. and L., and that L. had received monies on account of M. for which he had not accounted, and that M. had paid large sums of money on account since 1823, and that the defendants had in their possession, &c. books, deeds, &c. from which the truth of those allegations would appear, and that the Defendants ought to set forth an account of their pecuniary transactions since 1823; that N. was a trustee for M. of the goods comprised in the deeds of assignment; that M. had a beneficial interest of great value in the goods, which was the only property of M. that could be made applicable to the payment of the debt owing to the Plaintiff under the execution. Upon

these grounds the Plaintiff by his bill prayed a declaration that the assignments as against him were void, and might be cancelled; an account of his debt upon the judgment; an account of dealings between M. and N. since 1823; and if a balance should be found due to L., then an inquiry whether L. had any lien upon the goods, M. thereby offering to pay to L. the amount of what might be found due to him upon the security of the goods.

The Defendant, by his answer, contended that the deeds of assignment were his title deeds, which were made and delivered to him for a full valuable consideration; and insisted that he was not bound to make further answer as to the particular inquiries of the bill. Exceptions having been taken to this answer and allowed, a further answer was put in by N., to which was annexed two schedules, in one of which he set forth a list and description of the deeds of assignment of the goods; and in the other, an account of dealings and transactions between him and M. Thereupon a motion was made, that the deeds, &c. comprised in the first schedule, might be brought into Court for the inspection of the Plaintiff, and an order made accordingly. Upon appeal against this order, it was confirmed.

1837.

LATIMER

v.

NEATE.

THE Respondent, in Easter term, 1835, exhibited his bill of complaint against the Duke of Marlborough and the Appellant, in his Majesty's Court of Exchequer, at Westminster; and the Respondent, by his bill, stated and charged, that he, the Respondent, in and prior to the year 1812, occupied a farm and premises, situate, lying, and being at Overton, in the county of Wilts, as tenant thereof to George, then Duke of Marlborough, father of the Defendant the Duke of Marlborough, then Marquis of Blandford; and that in or about the month of January, 1812, the said Defendant, the Duke of Marlborough, applied to, and requested the Respondent to lend and advance to him the sum of 2,000*l.* upon the security of his the said

1837.

LATIMER

v.

NEATE.

Defendant's bond ; and that at or about the time when he made the said application for money, the said Defendant informed the Respondent, or caused him to be informed, that if he did not find him, the said Defendant, some money, he the said Defendant, would turn him out of the said farm and premises as soon as the father of the said Defendant died ; and that the Respondent did accordingly lend and advance to the said Defendant the sum of 2000*l.*, and thereupon that the said Defendant executed and delivered to the Complainant his bond, bearing date the day of January, 1812, in the penal sum of 4000*l.*, for securing the repayment to the Respondent of the said sum of 2000*l.*, and interest thereon, by the said Defendant whenever he should be thereunto requested.

That in the month of January, 1815, and before any part of the principal sum of 2000*l.* or the said interest thereon had been paid, the said Defendant, the Duke of Marlborough, then Marquis of Blandford, again applied to and requested the Respondent to lend and advance to him a further sum of money, and to make up the amount of his said loan 10,000*l.* in the whole, including the said principal and interest secured by his said bond ; and that the Respondent complied with the said last-mentioned application in part, and in or about the 21st of January, 1815, he lent and advanced to the said Defendant a large sum of money, which, together with the principal and interest, then due to the Respondent from the said Defendant, upon his said bond, amounted to the sum of 7000*l.* ; and, that thereupon the said bond, bearing date the day of January, 1812, was cancelled ; and that the said Defendant, the Duke of Marlborough, by

his writing obligatory, bearing date the 21st of January, 1815, sealed with his seal, acknowledged himself to be held and firmly bound unto the Respondent in the sum of 14,000*l.*, to be paid to the Respondent, his attorneys, executors, administrators, or assigns, and that the said writing obligatory was made subject to a certain condition, in the words and figures, or to the purport and effect, following, that is to say — The condition of this obligation is such, that if the above-bounden George Marquis of Blandford, his heirs, executors, or administrators, or either of them, shall and do well and truly pay or cause to be paid unto the above-named William Neate, his executors, administrators, or assigns, the full sum of 7000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, with lawful interest for the same, within one year next after the decease of the most noble George Duke of Marlborough, the father of the said Marquis, then this obligation to be void and of no effect, or else to remain in full force and virtue.

That the said last-mentioned bond was prepared by Mr. Pinniger, the attorney of the other Defendant, the Duke of Marlborough; and that Samuel Fellows, the attesting witness to the said bond, at the time of the execution thereof, was, and he still is, in the service and employment of the said Defendant, the Duke of Marlborough, as house steward, and that he continued in such service and employment until the year 1826 or 1827; and that the said Respondent did not, upon the occasion of the said last-mentioned advance of money, employ or consult any attorney or legal adviser; and that when the said last-mentioned bond was executed and delivered to the Respondent, he

1837.


LATIMER
v.
NEATE.

1837.

LATIMER

v.

NEATE.

believed, that the said bond was in the common form and payable at any time; and that in or about the month of April, in the year 1816, the interest on the said sum of 7000*l.* was in arrear, and that the Respondent shewed the said bond to his then Solicitor, Mr. Tilby, of Devizes, and that upon that occasion, the Respondent discovered, for the first time and to his great surprise, that, by the aforesaid condition of the said bond, the principal sum of 7000*l.* and the interest thereon, were not payable until after the death of the late Duke of Marlborough, the father of the Defendant, the Duke of Marlborough.

That in or about the month of November, 1815, and before he, the Respondent, had discovered, as aforesaid, that the said bond, of the 21st of January, 1815, was not in the common form, and that by the said condition, the said principal sum and interest was not payable until after the death of the late Duke of Marlborough, the said Defendant, the Duke of Marlborough, then Marquis of Blandford, wrote a letter to the Respondent, and requested him to come and see him the said Defendant, and to bring with him the sum of 100*l.*, and that the said letter was in the words and figures, or to the purport and effect following — that is to say, “ Sir—I
 “ shall be very glad if you could come to me
 “ directly, at White Knight’s, either to-morrow or
 “ Sunday. — I have business of importance with
 “ you. If you bring me about 100*l.* with you, I
 “ should be much obliged to you. — Your humble
 “ servant, Spencer Blandford. White Knights, Fri-
 “ day.” Addressed, “ Down post, Reading, Novem-
 “ ber 10th, 1815. Mr. Neate, junior, Overton, near
 “ Marlborough ;” — and that after the receipt of

the said letter, and on or about the 12th of November, 1815, the Respondent went to White Knights, the then residence of the said Defendant, and had an interview with the said Defendant, who then told the Respondent that he had 5*l.* only in his pocket when he left London the previous day, and that he had not one shilling left for his own use or the payment of his servants that night; and thereupon the Respondent, at the earnest entreaties of the said Defendant, lent and advanced him the further sum of 100*l.*; and that the Respondent soon afterwards received from the said Defendant an acknowledgment, upon unstamped paper, in the following words:—"November 20th, 1815. Memorandum. I acknowledge to have received of "Mr. W. Neate the sum of 100*l.*, on account of "Baron Blandford."

That George Duke of Marlborough, father of the said Defendant, the Duke of Marlborough, died on or about the 30th of January, 1817; and that immediately upon the expiration of one year after his death, the Respondent caused an action to be brought in His Majesty's Court of King's Bench, at Westminster, against the Defendant, the Duke of Marlborough, upon his said bond of the 21st of January, 1815, to recover the principal money and interest thereby secured, the whole of which was then due and owing to the Respondent from the said Defendant; that the said Defendant, the Duke of Marlborough, for the purpose of harassing and injuring the Respondent, and preventing him from proceeding to trial in the said action, kept the said Samuel Fellows, the attesting witness to the said bond, out of the way, and actually for a long time prevented the Respondent from dis-

1837.

LATIMER

v.

NEATE.

1837.

 LATIMER
 v.
 NEATE.

covering the place of residence of the said Samuel Fellows, and from serving him with a subpoena *ad testificandum* in the said action; and that the Respondent was, in fact, prevented, by such unfair and improper conduct, and by other contrivances of the said Defendant, the Duke of Marlborough, from proceeding to trial in the said action.

That, nevertheless, on or about the 25th of November, 1818, the said John Pinniger, as the attorney for the said Defendant, the Duke of Marlborough, signed a cognovit in the said action, which was in the words and figures, or to the purport and effect following, that is to say — “ In the
 “ King’s Bench — Between William Neate, Plain-
 “ tiff, and The Most Noble George Duke of
 “ Marlborough, Defendant. I hereby confess the
 “ debt in this cause, and that Plaintiff has sustained
 “ damages to the amount of 1s., besides his costs
 “ and charges to be taxed by the Master; but no
 “ execution is to issue unless default shall be made
 “ in the payment of the sum of 8480*l.*, being the
 “ debt for which this action is brought, including
 “ interest thereon up to the time of payment
 “ thereafter-mentioned, together with the costs
 “ of this action, to be taxed as aforesaid, on the
 “ sixth day of next Hilary Term; but in case of
 “ such default, the said Plaintiff is to be at liberty
 “ to issue execution and levy the said sum of
 “ 8480*l.*, together with any subsequent interest that
 “ may accrue on the sum of 7000*l.*, the principal
 “ money for which this action is brought; and the
 “ costs to be taxed as aforesaid; and also costs of
 “ execution, sheriff’s poundage, and all other in-
 “ cidental expenses. And I hereby agree to with-
 “ draw the pleas pleaded herein, and that no writ

“ of error shall be brought, or bill in equity filed.

“ Witness my hand this 25th of November, 1818.”

That on the 25th of November, 1818, final judgment upon the said cognovit was duly filed in the said action for the sum of 14,100*l.* debt, and 158*l.* 1*s.* for damages, as well on occasion of detaining the said debt as for the Respondent's costs and charges by him about his suit in that behalf expended; that the said judgment having been suffered to abate, it was at a subsequent period, viz. in Easter term, 1821, duly revived by *scire facias*; and that the said judgment had been since kept on foot by continuances duly entered according to the practice of the said Court of King's Bench, and that the said judgment still remained in full force and effect, not reversed or satisfied or otherwise vacated; and that the said judgment being in full force, and the said debt and damages so recovered as aforesaid remaining unpaid and unsatisfied, the Respondent, in or about the month of November, 1824, for the obtaining satisfaction thereof, sued and prosecuted out of the said Court of our Lord the King, before the King himself at Westminster, a writ of *feri facias* directed to the sheriff of Oxfordshire, by which writ the sheriff was commanded, that of the goods and chattels of the said Defendant, the Duke of Marlborough, in his bailiwick, he should cause to be levied the debt and damages aforesaid.

That the writ was made returnable on the day of ; and the said writ was indorsed with a direction for the sheriff to levy besides sheriff's poundage, officers' fees, and all other incidental expenses, and was duly delivered to the sheriff, who, by virtue of the said writ, seized and took in execu-

1837.

LATIMER

D.

NRATE.

1837.

LATIMER

v.

NEATE.

tion divers goods and chattels of which the said Defendant, the Duke of Marlborough, was then in possession at his residence at Blenheim, in the county of Oxford, of the value of £. or thereabouts; and that the Appellant claimed part of the said goods and chattels which were so taken in execution as aforesaid, and brought an action in the said Court of King's Bench, against the said sheriff, for seizing and taking away the said goods and chattels; and that the Respondent indemnified the said sheriff against the said action; and that at the trial of the said action at the Oxford Assizes, in the summer of 1825, the jury found a verdict for the Appellant who was Plaintiff in the said action, and that the Respondent was put to very great and heavy expenses in and about the said levy, and in defending the said action which the Appellant brought against the said sheriff; and that the whole sum of money which he received under the said levy, in part satisfaction of his said debt and damages, had been exhausted in the payment of part of the expenses, which greatly exceeded in amount what the Respondent got under the said levy.

That on the 22d of May, 1833, there was due and owing to him from the said Defendant, the Duke of Marlborough, upon the said judgment, the sum of 12,696*l.* 1*s.* 6*d.*; and that on or about the said 22d of May, 1833, the Respondent, for the obtaining satisfaction thereof, sued and prosecuted out of the said Court of King's Bench, against the said Defendant, the Duke of Marlborough, a writ of *pluries testatum fieri facias*, returnable on the 1st of November, 1833, directed to the sheriff of Oxfordshire, indorsed to levy

12,696*l.* 1*s.* 6*d.* and interest on 7100*l.*, from the 1st of May, 1833, until paid, besides sheriff's poundage, officers' fees, and all incidental expenses; and that the said sheriff, by virtue of the said last-mentioned writ, and before the return of the said writ, seized and took in execution, divers goods and chattels of great value, which then were in and upon the said Defendant's, the Duke of Marlborough's, mansion-house and lands at Blenheim, in the county of Oxford.

That the Appellant, and the Defendant, the Duke of Marlborough, applied to the sheriff, after he had seized and taken in execution the said goods and chattels, and requested him not to levy the monies indorsed on the said last-mentioned writ, or any part thereof, out of the said goods and chattels, but to allow the said Defendant, George Duke of Marlborough, to continue in the possession and enjoyment of the same to his own use, and to return to the said Court of our Lord the King, upon the said writ, that the said Defendant, George Duke of Marlborough, had not any goods and chattels in his bailiwick whereof he could cause to be levied the said monies indorsed on the said writ, or any part thereof; and that at the same time, when they, the Appellant and said Defendant, the Duke of Marlborough, made the said application and request to the said sheriff, that the said Defendant, George Duke of Marlborough, and the Appellant stated to the said sheriff, or to his officers, that all the goods and chattels which he had so seized and taken in execution as aforesaid, were the absolute property of the Appellant, and that no part thereof was the property of the Defendant, George Duke of Marlborough, legally seizable under and by virtue of the said writ.

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.

NEATE.

That the said Defendant, the Appellant, and the said Duke of Marlborough, undertook and promised to indemnify the said sheriff in the fullest manner against any action that might be brought against him by the Respondent for a false return of *nulla bona* to the last-mentioned writ; and that the Appellant, or some of his friends, did, in the first instance, indemnify the said sheriff, but that the officers of the said sheriff were not withdrawn until the said Defendant, the Duke of Marlborough, and some of his friends did also indemnify the said sheriff; and that at or about the time when the said Defendant, the Duke of Marlborough, and his friends so indemnified the said sheriff, the said Defendant advanced to the said John Pinniger the sum of 200*l.* towards the costs of the defence of any action at law that might be brought against the said sheriff; and that the said sheriff complied with the said application and request of the said Defendants, the Appellant, and the said Duke of Marlborough, and that at the return of the said last-mentioned writ, he returned, at the special instance and request of the said Defendants, to the said Court of our Lord the King, upon the said writ, that the said Defendant, George Duke of Marlborough, had not any goods or chattels in his bailiwick whereof he could cause to be levied the debts and damages aforesaid or any part thereof.

That on or about the 22d of February, 1834, the said Respondent brought an action on the plea side of his Majesty's Court of Exchequer, against the said sheriff for a false return of *nulla bona* to the said last-mentioned writ, and that the said sheriff pleaded a plea of not guilty to the said action which

was then pending ; and that the said Defendant, the Appellant, and the said Duke of Marlborough, or one of them, had by some deed or instrument indemnified fully the said sheriff in the said action ; and that they the said Defendants, the Appellant, and the Duke of Marlborough, were, in fact, the real Defendants in the said action, and that no persons or person besides the said Respondent, and the said Defendants, the Appellant and the said Duke of Marlborough, had any substantial interest in the said last-mentioned action.

That the said Defendant, George Duke of Marlborough, on the 22d of May, 1833, resided, and that he had ever since that day resided, and that he then did still reside, at Blenheim, in the county of Oxford ; and that the mansion-house at Blenheim is very large, and consists of a great number of rooms and apartments, and offices of various descriptions ; and that the park, pleasure grounds, plantations, and gardens, attached to the said mansion-house at Blenheim, are very extensive, and consist of a great number of acres ; and that the said Defendant, George Duke of Marlborough, on the 22d of May, 1833, was, and that he had ever since been, in the occupation of the said mansion-house, offices, park, pleasure grounds, plantations, and gardens, and every part thereof ; and that at the time when the said last-mentioned writ was delivered to the said sheriff as aforesaid, there was, and ever since had been, and that there then was, in and upon the said mansion-house, estate, and premises, at Blenheim aforesaid, a large quantity of goods and chattels, and personal estate and effects of various kinds and descriptions of very great value in the whole, consisting, amongst

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.
NEATE.

others, of the following particulars, that is to say, of deer, sheep, horses, cows, oxen, a Spanish ass, hay and straw, and various kinds of agricultural produce, carts, agricultural implements, garden tools, plate, books, pictures, wines, liquors, articles of ornament, household furniture, wearing apparel, microscopes, telescopes, maps, globes, plants, and flowers.

That one Samuel Brindfield then lived, and for many years past had lived, as a servant with the said Defendant, the Duke of Marlborough; and that the said Samuel Brindfield, and many other servants of the said Defendant, were most material and necessary witnesses for and on behalf of the Respondent in the said action against the said sheriff; and that without the testimony of the said Samuel Brindfield, and the said other servants, he could not with safety proceed to the trial of the said action; and that the said Samuel Brindfield, and the said other servants, were completely under the influence and control of the said Defendant, the Duke of Marlborough; and that the said Defendant, well knowing the value of their testimony as aforesaid to the Complainant in the said action, had hitherto prevented them from attending to give evidence in the said action; and that the said Defendant, the Duke of Marlborough, was able to prevent them, and each of them, from giving evidence in the said action; and that he threatened and intended, in case the Respondent should proceed to trial in the said action, and should subpoena the said Samuel Brindfield, and the said other servants, or any of them, as witnesses in the said action, to hinder and prevent them, as he would be able to do, from attending at the said trial.

That in the years 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, and 1832, several bills of sale, and assignments of part of the goods and chattels, personal estate, and effects, in and about the said mansion-house, estate, and premises, at Blenheim, were executed to the Appellant; and that the bills of sale and assignments were, in fact, executed to the Appellant by the said Defendant, the Duke of Marlborough, or by some other person or persons acting by the orders or under the directions of the said Defendant, the Duke of Marlborough; that two of the said bills of sale are dated the 24th of September, 1824, that another of the said bills of sale is dated the 3d of December, 1825, that another of the said bills of sale is dated the 1st of June, 1829, that one of the said assignments is dated the 18th of April, 1826, that another of the said assignments is dated the 26th of December, 1828, and that another of the said assignments is dated the 8th of August, 1832; and that all and each of the said bills of sale and assignments which were so made and executed to the Appellant in the years 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, and 1832, were made and executed to the Appellant without any consideration having been paid or given for the same by the Appellants; and that the Appellant did not, in fact, at the several times when the said bills of sale and assignments, or any of them, were or was executed as aforesaid, or at any other times or time, pay or give at Blenheim, or at any other place, any good or valuable consideration, or any consideration whatever of any value or to any amount, to the said Defendant, the present Duke of Marlborough, or to any other persons or person, for all or any part of the said goods,

1837
LATIMER
v.
NEATE.

1837.

LATIMER

v.

NEATE.

chattels, personal estate, and effects, comprised in the said bills of sale and assignments or any or either of them.

That no part of the said goods and chattels, personal estate, and effects, comprised in the said bills of sale and assignments, has ever, at any time, been removed or taken away by any person from the said mansion-house, estate, and premises, at Blenheim, but that the said Defendant, the Duke of Marlborough, ever since the said bills of sale and assignments were made, had continued to use, and did then use, the same and every part thereof as his own absolute property ; and that at the several times when the said bills of sale and assignments were executed, the said Defendant, the Duke of Marlborough, was in embarrassed circumstances, and indebted to the Respondent upon said judgment to a large amount, and also to several other persons to a very large amount in the whole ; and that all the said bills of sale and assignments then were, and always had been, void and of none effect in equity against the Respondent, and that no part of the said goods and chattels, personal estate, and effects, in and upon the said mansion-house, estate, and premises, did belong to any persons or person, as trustees or trustee, under the will of the late Duke of Marlborough ; but if any part of the said goods, chattels, personal estate, and effects, in and upon the said mansion-house, estate, and premises, did belong (which the Respondent did not admit) to any persons or person as trustees or a trustee under the said will of the late Duke of Marlborough, that the said Defendants, the Appellant and the Duke of Marlborough, were well able to set forth, and ought to set forth, a correct list or

schedule of all the goods and chattels in and upon the said mansion-house, estate, and premises, at Blenheim, which did not belong to the said trustees; and that they the said Defendants, the Appellant, and the Duke of Marlborough, then had in their possession custody or power, schedules of, or a schedule of, all the said goods and chattels that did not belong to the said trustees.

That in or about the year 1823, one Charles Richardson obtained a judgment in the Court of King's Bench, at Westminster, against the said Defendant, the Duke of Marlborough, and issued a writ of *fieri facias* thereon against the said Defendant, under which property of various descriptions, and consisting of household furniture, wine, and farming stock, part of the goods and chattels in and upon the said mansion-house and premises at Blenheim, was seized by the sheriff of the county of Oxford; and that the said Charles Richardson took a bill of sale of the said property which was so seized as last aforesaid from the said sheriff; and that in or about the month of May the Appellant took from the said Charles Richardson a bill of sale of the said last-mentioned goods and chattels, and paid the said Charles Richardson for them the sum of 700*l.*, and put a servant into possession; and that although the said Defendant, the Duke of Marlborough, continued in possession of the said last-mentioned goods and chattels after the execution by the said Charles Richardson, and after payment of the sum of 700*l.* by the Appellant, it was decided by the Court of King's Bench, in an action which was brought by the Appellant against the then sheriff of Oxfordshire, in or about the year 1825, that the said sale of the said goods

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.

NEATE.

and chattels, by the said Charles Richardson, to the Appellant was good in point of law, and vested in the Appellant the property in the said last-mentioned goods and chattels; and that all, or a greater part, of the said last-mentioned goods and chattels then were, and ever since the said sale thereof to the Appellant had been, in and upon the said mansion, estate, and premises, at Blenheim; and that during all the time aforesaid the said Defendant, the Duke of Marlborough, had continued, with the consent of the Appellant, to have the use and enjoyment thereof.

That in or about the year 1826 it was agreed by and between the said Defendants, the Duke of Marlborough and the Appellant, that the Appellant should sell the said last-mentioned goods and chattels to the said Defendant, the Duke of Marlborough, for the sum of 700*l.*, and which sum the said Defendant, the Duke of Marlborough, promised to pay to the said Appellant for the same, and at the same time it was further agreed between the said Defendants that until the whole of the said sum of 700*l.* should be paid to the Appellant by the said Defendant, the Duke of Marlborough, the said last-mentioned goods and chattels should remain a security to the Appellant for the said sum of 700*l.* or so much as should remain unpaid; and that upon payment of the said 700*l.* the Appellant should execute to the said Defendant, the Duke of Marlborough, a bill of sale or assignment of the said goods and chattels; and that the whole of the said sum of 700*l.* had been paid by the said Defendant, the Duke of Marlborough, to the Appellant; that the Defendant, the Duke of Marlborough, then was, and for a long time past had been, the only person

beneficially interested in, and equitably entitled to, the said last-mentioned goods and chattels; and that he became so beneficially interested in, and equitably entitled, by the means and under the circumstances aforesaid, or under and by virtue of some other arrangement with the Appellants.

That since the making of the said last-mentioned agreement there had been pecuniary dealings and transactions, to a large amount, between the said Defendants, the Duke of Marlborough and the Appellant, that various large sums of money had been paid by the said Defendant, the Duke of Marlborough, to the Appellant in satisfaction of the said sum of 700*l.*; and that the Appellant had received a large sum of money on account of the said Defendant, the Duke of Marlborough, which was applicable, and ought to have been applied by him to the payment of the said sum of 700*l.*; but that the Appellant had not executed an assignment or a bill of sale of the said last-mentioned goods and chattels to the said Defendant, the Duke of Marlborough, and that the legal property of and in the said goods and chattels was still vested in the Appellant; and that nevertheless, when the said Defendants, the Duke of Marlborough and the Appellant, should set forth, as they were able and ought to do, a full, true, and particular account of all and every sum and sums of money received and paid by the said Defendant, the Duke of Marlborough, for or on the account of the Appellant, since the year 1823 inclusive; and of all and every sum and sums of money received and paid by the Appellant for or on account of the said Defendant, the Duke of Marlborough, since the year 1823 inclusive; it would clearly appear, as the fact was,

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.

NEATE.

that nothing was due from the said Defendant, the Duke of Marlborough, to the Appellant in respect of the said sum of 700*l.*, and that the Appellant was bound, and ought to be compelled, to execute an assignment, or a bill of sale, of the last-mentioned goods and chattels to the said Duke of Marlborough, in order that the said goods and chattels might become liable to be seized under a writ of execution against the personal property of the said Defendant, the Duke of Marlborough.

That the said Respondent had always been, and then was, ready and willing and thereby offered to pay to the Appellant what, if anything should appear to be due to him from the said Defendant, the Duke of Marlborough, upon the security of the said last-mentioned goods and chattels, and to take an assignment of the said goods and chattels from the Appellant, in part satisfaction of the said judgment debt and damages; and that the said Defendants, the Duke of Marlborough and the Appellant, then had, or lately had, in their possession, custody, or power, divers deeds, bills of sale, assignments, schedules, accounts, or account books, receipts, papers, letters, and writings, relating to the matters aforesaid, and from the production of which the truth of the matters aforesaid or some of them would appear, and that they ought to set forth a list or schedule of the said deeds, bills of sale, assignments, schedules, accounts, account books, receipts, papers, letters, and writings, and to leave such of them as were then in their possession, custody, or power, in the hands of their clerk in Court, and to set forth what had become of such of them as were not then in their possession, custody, or power, and in whose possession, cus-

today, or power the same then were ; and that there was then due and owing to the said Respondent, from the said Defendant, the Duke of Marlborough, upon the said judgment, the sum of 13,375*l.* at the least, and that by reason of the nonpayment of the said debt the said Respondent sustained a great loss ; and that although it was true that the greater part of the said goods and chattels in and upon the said mansion-house, estates, and premises, at Blenheim, were comprised in certain bills of sale and assignments to the Appellant, and that the Appellant under and by virtue of the said bills of sale and assignment were the apparent legal owner of the said goods and chattels comprised therein, that the fact was, and that so it would appear, when the said Defendants, the Duke of Marlborough and the Appellant, should have made, as they were able and ought to do, a full and true disclosure and discovery of the several matters and things therein stated, and should have set forth, as they were able and ought to do, a true account of the pecuniary dealings and transactions between them since the year 1823 inclusive, that the Appellant was a trustee of the said goods and chattels comprised in the said bills of sale and assignment, or some of them, for the said Defendant, the Duke of Marlborough ; and that the said Defendant, the Duke of Marlborough, had an equitable and beneficial interest of great value in such of the goods and chattels that were in and upon the said mansion-house, estate, and premises, at Blenheim ; and that such equitable beneficial interest was the only property of the said Defendant, the Duke of Marlborough, of considerable value, that could, by any

1837.

LATIMER

v.

NEATE,

1837.

LATIMER

v.

NEATE.

means, be made applicable to the payment of any part of the debt so due to the said Respondent ; and that the said Defendants, the Duke of Marlborough and the Appellant, had hitherto prevented and that they intended to continue to prevent him by every means in their power from obtaining payment of any part of the said judgment debt out of the said equitable and beneficial interest of the said Defendant, the Duke of Marlborough ; and that under all the circumstances aforesaid, he could not safely proceed to trial in the said action then pending against the said sheriff for a false return, or usefully issue any writ of execution upon the said judgment against the said Defendant, the Duke of Marlborough, or by any other proceedings at law obtain payment of any part of the said judgment debt ; and that without the assistance of a court of equity, he would be unable to make the said beneficial and equitable interest of the said Defendant, the Duke of Marlborough, applicable to the payment of the said debt, or any part thereof, and that he is entitled to receive satisfaction of his said debt, out of the said equitable interest of the said Defendant, the Duke of Marlborough, in the said goods and chattels ; and that if the Respondent should claim to have any lien or security upon all or any part of the goods and chattels, for the re-payment of any debt or debts, due and owing to him from the said Defendant, the Duke of Marlborough, he ought to set forth the particulars of such lien or security, and how he made out the same, and upon which of the said goods and chattels the said lien or security attached ; the Respondent thereby offering to pay to the Appellant, what, if any thing, should be due to him from the

said Defendant, the Duke of Marlborough, upon the security of the said goods.

The prayer of the Bill was, That it may be declared by this honourable Court that all the said bills of sale and assignments of the said goods and chattels, in and upon the said mansion-house, estate, and premises at Blenheim, made and executed by the said Defendant, the Duke of Marlborough, to the said Defendant, Edward Latimer, are void, as against your orator, and that the same ought to be delivered up, by the said Defendant, Edward Latimer, to be cancelled, and that the same may be ordered to be delivered up and be cancelled accordingly: and that it may be referred to one of the Masters of this honourable Court to take an account of what is due from the said Defendant, the Duke of Marlborough, to your orator, upon the said judgment, and for his debt, damages, and costs: and also to take an account of all pecuniary dealings and transactions between the said Defendants since the beginning of the year 1823 inclusive, and if the said Master, upon taking the said last-mentioned account, shall find a balance to be due from the said Defendant, the Duke of Marlborough, to the said Defendant, Edward Latimer, in that case, that he may be directed, attending to the declarations aforesaid, to inquire and state whether the said Defendant, Edward Latimer, now has any lien or security for the repayment of the whole or any part of the said balance upon all or any part of the goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim, your orator hereby offering to pay to the said Defendant, Edward Latimer, what, if any thing, shall be found

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.
NEATE.

in manner aforesaid, due to him from the said Defendant, the Duke of Marlborough, upon the security of the said goods and chattels, and that the value of the said goods and chattels, and the particulars whereof they consist, may be ascertained, and that the said goods and chattels may be sold, and the proceeds of such sale applied in the first place in the payment of your orator's costs of this suit, and in the next place in the payment of what shall be found in manner aforesaid to be due from the said Defendant, the Duke of Marlborough, to your orator, and of what, if any thing, your orator shall pay to the Defendant, Edward Latimer, and that the said Defendant, Edward Latimer, if a necessary party to such sale, may be ordered to join therein; or that it may be referred to the said Master to take an account of the goods and chattels in and upon the mansion-house, estate, and premises, at Blenheim, and to ascertain and state the value thereof, and the nature and amount of the equitable interest therein of the said Defendant, the Duke of Marlborough, and that such equitable interest may be applied, so far as it will extend, to the satisfaction of your orator's said debt, and of what, if any thing, your orator shall pay to the Defendant, Edward Latimer, and that all necessary and proper directions may be given for the several purposes aforesaid, and the other purposes of this suit.

The Appellant by his answer, amongst other things, stated, that he believed the Respondent did issue a writ of *Pluries Testatum Fieri Facias*, and that the sheriff did seize some part of the goods and chattels at Blenheim, belonging to the Appellant, and in the possession of Richard Wilson,

his servant and agent, and that he the Appellant did claim of the sheriff the goods so seized by him under the said writ of *Pluries Testatum Fieri Facias*, and did promise and undertake to indemnify the sheriff for making a return of *nulla bona*, and that, for the purpose of indemnifying the said sheriff, he accordingly gave him the joint and several bond of the Appellant, and of his friends, Trind Cregoe, Esq., and Mr. James Barrack, in a sufficient sum.

That he the Appellant claimed to be the legal owner as against the Respondent of all and every the goods and chattels in and upon the mansion-house and premises at Blenheim, save such of them as are heir looms or belong to the trustees of the late Duke of Marlborough's will; that he claimed to be the legal owner thereof under and by virtue of certain bills of sale, assignments, and legal instruments bearing date as follows; that is to say, the 24th of September, 1824, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824, (three) the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and 5th of June, 1833, all which said bills of sale, assignments, and legal instruments, were duly executed by all proper parties for a full and valuable consideration. That the said bills of sale, assignments, and legal instruments, were the title deeds of the Appellant; that all and every one of the said bills of sale, assignments, and legal instruments, now in his possession, were made and delivered to him for a full and valuable consideration, by all proper parties, and that the same are the title deeds of him, the

1837.

LATIMER

v.

NEATE.

1837.
LATIMER
v.
NEATE.

Appellant, and that the Respondent claims the same goods and chattels hostilely to him the Appellant, by his said bill and action at the Common Law.

That the Duke of Marlborough had, ever since all the bills of sale and assignments now in the possession of him, the Appellant, were made, by permission of the Appellant, continued to use all the said goods and chattels remaining in and upon the mansion-house and premises at Blenheim, which are the property of the Appellant; but the Appellant denied it to be true, that the Duke of Marlborough ever since the said bills of sale and assignments, or any of them, were made, or since any time, had continued to use and did then use the same or any part thereof as his own absolute property, for the Appellant said, the same had been ever since the said respective bills of sale, thereof, and were then, in the possession of the said Richard Wilson, the servant and agent of the Appellant.

That the Appellant believed that the Duke of Marlborough was, at the time when the said bills of sale, assignments, and legal instruments, were executed, in embarrassed circumstances, and was indebted to the Respondent. That he the Appellant did not believe that he was a trustee of the said goods and chattels, or any of them, comprised in the said bills of sale and assignments, or any of them, for the Duke of Marlborough, but the Appellant said, that as between himself and the Duke of Marlborough he only claimed in equity to be a mortgagee, or to have a lien on all the said goods and chattels, to secure payment of the debt of 8000*l.*, and upwards, due and owing to him

from the Duke of Marlborough. That the Appellant, upon payment of the debt of 8000*l.* and upwards, then due and owing to him, into Court, was willing to deposit and bring into Court all and every the bills of sale, assignments, and legal instruments then in his possession or power, and to act as the Court should direct.

The Appellant, by his answer, further said, that the bills of sale, assignments, and legal instruments were his title deeds, and he submitted and insisted he was not bound to answer and set forth, save as in his answer to the said bill of complaint is set forth, whether in the several years in the said bill in that behalf mentioned, or in any or what other years or year, several or any bills of sale and assignments, or bill of sale or assignment, of any or what part of the goods and chattels, personal estate and effects, in and about the mansion-house, estate, and premises at Blenheim, and not belonging to the said trustees, were or was not executed to the Appellant, or any other person, or whom by name, or whether the said bills of sale and assignments, or any, or one, or which of them, were or was not in fact executed to the Appellant by the said Duke of Marlborough, or by any other or what persons or person acting by the orders or under the directions of the said George Duke of Marlborough, or how otherwise, or whether all, or each, or some, or which, of the said bills of sale and assignments, which are in the said bill alleged to have been so made and executed to the Appellant in the years 1824, 1825, 1826, 1827, 1828, 1830, 1831, and 1832, or in some and which of such years, or at some other and what time, were or was not made and executed by the Appellant,

1837.

LATIMER

v.

NEATE.

1837.

LATIMER

v.

NEATE.

without any consideration having been paid or given for the same by the Appellant, or whether the Appellant did in fact, at the several times when the said bills of sale and assignments, or any and which of them, were or was executed, or at any other time, and what times or time, pay or give at Blenheim, or at any other and what place, any and what good or valuable consideration of any and what value, or to any or what amount, &c.

And the Appellant, by way of exception to the Respondent's bill, insisted that he had not so framed his bill as to entitle him to call upon the Appellant to make any further or other discovery than the matters thereinbefore by that, his answer, mentioned and set forth; and the Appellant insisted that the Respondent had not so framed his bill, or so stated his case therein, as to entitle him to the relief prayed by his bill; and the Appellant claimed the same benefit of the said exception, as if he had pleaded or demurred to the relief prayed by the said bill for want of equity: And as against the Respondent, he claimed, under and by virtue of the said bills of sale, assignments, and legal instruments, thereinbefore mentioned, to be the legal owner of all and every the goods and chattels, in and upon the said mansion-house, estate, and premises, at Blenheim, save such of them as were heir looms, and such of them as belonged to the trustees of the late Duke of Marlborough's will; and as against the said Defendant, the Duke of Marlborough, the Appellant claimed only to have an equitable mortgage or lien upon the said goods and chattels, to secure payment of the said debt of 8000*l.* and upwards, then claimed to be due and owing from the said Defendant, the Duke of Marl-

borough, to the Appellant; and the Appellant submitted and insisted, that the Respondent had not so stated his case, or framed his bill, as to entitle him to redeem the said equitable mortgage and lien of the Appellant, or to have any accounts taken between the Appellant and the said Defendant, the Duke of Marlborough, in the relative characters of equitable mortgagor and equitable mortgagee: And that he, the Appellant, upon payment of the said sum of 8000*l.* and upwards, then due and owing to him, into Court, was willing and ready to deposit and bring into Court all and every the bills of sale, assignments, and legal instruments, then in his possession or power, and to act in the premises as this honourable Court should be pleased to direct; — and that annexed to the said answer was a schedule of farming stock and other effects, removed from Blenheim by the Appellant, during the years 1824, 1825, and 1826.

The Respondent took forty-eight exceptions to the answer, part whereof were allowed, and the Appellant put in a further answer to the bill, on the 21st of April, 1836, whereby he answered the exceptions, and thereby (among other things) admitted it to be true, that, in the several years thereafter mentioned, such several and respective bills of sale and assignments, as thereafter mentioned, of such of the goods and chattels, personal estate and effects, in and about the mansion-house, estate, and premises, at Blenheim, and not belonging to the trustees in the bill mentioned, were respectively executed to the Appellant, or to such other persons or person by name, as thereafter mentioned: And that the bills of sale and assignments, were in fact executed to the Appellant, or

1837.

LATIMER

v.
NEATE.

to such other persons or person as thereafter mentioned by the Duke of Marlborough in the said bill, named as a Defendant, or by such other persons or person acting by the order, or under the direction of the Defendant, the Duke of Marlborough, or by such other persons or person as thereafter mentioned ; — and that he, the Appellant, did in fact, at the several times thereafter mentioned, when the said bills of sale and assignments were severally and respectively executed, as thereafter mentioned, pay or give, at Blenheim, or at such other places or place, as thereafter mentioned, some and such goods, or valuable consideration of such value, or to such amount respectively, or such consideration to the Defendant, the Duke of Marlborough, or to such other persons or person, for all and every, and such respective parts or part of the goods and chattels, personal estate and effects, comprised in the said bills of sale and assignments, severally and respectively, as thereafter mentioned. And that he, the Appellant, had in the first schedule to that his answer annexed, and which, together with the other schedule thereunto annexed, he prayed might be taken as part of his said answer, set forth to the best and utmost of his knowledge, information, remembrance, and belief an account or description of all and every the said bills of sale and assignments, of the said goods, chattels, personal estate, and effects, in and about the said mansion-house, at Blenheim, not belonging (according to the Appellant's belief) to the said trustees, as were or was executed to the Appellant, or to any other person, and whom by name ; and of which the Appellant claimed the benefit as against the Respondent, distinguishing what goods,

chattels, personal estate, or effects, were or was comprised in each and every one of the said bills of sale and assignments, severally and respectively ; and that he, the Appellant, had in the said schedule distinguished whether the said bills of sale and assignments, or any or one, and which of them, were or was in fact executed to the Appellant, by the Defendant, the Duke of Marlborough, or by some other and what persons or person, acting by the order, or under the direction of the said Defendant, the Duke of Marlborough, or how otherwise ; and that he, the Appellant, had in the said schedule also set forth, whether he did in fact, at the several and respective times, when the said bills of sale and assignments, or any and which of them, were or was executed, or at any other and what times or time, pay or give, at Blenheim, or at any other and what place, any and what goods or valuable consideration, to the Defendant, the Duke of Marlborough, or to any other persons or person and whom, for all or any, and what part of the said goods and chattels, personal estate and effects, comprised in the said bills of sale and assignments, or any or either, and which of them.

The Appellant, by the further answer, denied it to be true, that since the making of the agreement in the bill mentioned, there had been any pecuniary dealings and transactions to a large or any amount, between the Appellant and the said Defendant, the Duke of Marlborough, inasmuch as the Appellant said, that no such agreement was ever made ; but the Appellant admitted it to be true, that there had been since such time as thereafter mentioned, such pecuniary dealings and transactions as in the Appellant's former answer

1837.

ATINER
P.
HEATL.

mentioned, to a large and such amount, as therein-after mentioned, between the Appellant and the Defendant, the Duke of Marlborough, and that he, the Appellant, had in the second schedule to that, his answer annexed, set forth to the best and utmost of his knowledge, information, remembrance, and belief, an account of such pecuniary dealings and transactions, and a full, true, and particular account of all and every sum and sums of money, received and paid by the Appellant for or on account of the said Defendant, the Duke of Marlborough, since the year 1823, inclusive.

Annexed to the answer were the two schedules referred to thereby.

On the coming in of the further answer, the Respondent served the Appellant with a notice of motion bearing date the 29th of June, 1836, and whereby he gave the Appellant notice that his Majesty's Court of Exchequer would be moved that the Appellant might, within a week, leave in the hands of his clerk in Court in this cause the several deeds, bills of sale, assignments, and legal instruments mentioned in the Appellant's answers sworn respectively the 9th of November, 1835, and the 21st of April, 1836, and the first schedule to the said last-mentioned answer, and thereby admitted to be in his custody, possession, or power, and therein-mentioned to bear date as follows, that is to say, the 24th of September, 1824, the same date, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824, (three) the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and the 5th of June, 1833; and also, upon oath, all

other deeds, bills of sale, assignments, legal instruments, and other documents and papers then in his custody, possession, or power, under or by virtue of which he claimed to have any title, charge, security, or lien, to or upon all or any of the goods, chattels, personal estate, and effects, in and about the mansion-house, grounds, estate, and premises, at Blenheim, in the county of Oxford, in the pleadings of this cause named; and that the Respondent, his clerk in Court, agent, or solicitor, might be at liberty to inspect and peruse the same, and to take copies thereof or abstracts or extracts therefrom.

The motion came on to be heard, and was argued by counsel, on the 1st of July, 1836, before the Lord Chief Baron of the Court of Exchequer, who was pleased to order that the Appellant should, within a week after service of the order, deposit with, and leave in the hands of his clerk in Court in the cause, the several bills of sale, assignments, and legal instruments in his two several answers filed in the cause mentioned, to be of the respective following dates, viz., the 24th of September, 1824, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824 (three), the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and the 5th of June, 1833, and that the Respondent, his solicitors, or agents, should be at liberty to inspect and peruse the same, and at his own expense to take such copies thereof or abstracts or extracts therefrom as he might be advised.

The order was passed and entered on the 11th of July, 1836.

1837.

LATIMER

v.

NEATE.

1857.
—
LAWRENCE
—
1857.

From this order the Defendant in the suit appealed to the House of Lords.

For the Appellant, Mr. *Temple* and Mr. *Elison*.

This is not a question whether a judgment creditor is entitled to redeem a mortgagee, or to inspect a mortgage security, but whether under such a bill as this the Plaintiff is entitled to the rights of a judgment creditor as against a mortgagee. The Respondent must stand or fall by the case made upon his bill, and he must shew admissions in the answer to entitle him to the inspection which he claims. The whole case substantially proceeds upon the ground, that the security is fraudulent and void. The bill prays a declaration to that effect, and that the deeds may be delivered up to be cancelled. It adds indeed a prayer, that, subject to the declaration aforesaid, an account of dealings and transactions between the Defendant and the Duke of Marlborough may be taken, and offers to pay the balance which may be found due upon the taking of that account; but this part of the prayer and the offer of payment is essentially connected with the previous part which asks that the securities may be declared void. It is evident from the whole complexion of the bill, that its only object is, not to redeem, but to pick holes in the Appellant's title. It is argued, that the doctrine of Lord Eldon, in *Beckford v. Wildman**, is decisive against us; if so, how does it happen that in such a case he should end by saying, that he could only order a production at the hearing? The supposition is inconsistent with the principle of the judg-

* 16 Ves. 438.

ment, and also with the doctrine of *Balch v. Symes**, in which he says indeed, “where a deed is sought to be impeached, the Plaintiff is entitled to have it produced, and no lien can protect the Defendant from producing it, for it is the object of the suit that the deed may be declared a nullity.” But then he adds, “a considerable question how- ever may arise, at what period of the cause the production can be compelled,” or how is it consistent with *Tyler v. Drayton*†, which, according to the argument, is in contradiction to the former cases. The proposition there stated — that reference to deeds in a schedule gives a right to the production — is read without the qualification, that is, “unless it appear by the description that it is evidence of the title, not of the Plaintiff, but of the Defendant, or that the Plaintiff has otherwise no interest in the production ;” and the order in that case was for the production of all the deeds mentioned in the schedule, except the purchase deeds. In *Sampson v. Swettenham*‡, the production of the purchase deeds was refused, because it was not shewn by the bill, or admitted by the answer, that the Plaintiff was entitled to the production.

The Respondents have relied on a passage in the answer, where it is alleged that the Duke of Marlborough owes *l.* whereas the debt as stated in the schedule is not more than *l.* ; but that apparent difference is because interest is not included in the schedule. The argument that the Duke of Marlborough was allowed to continue to use the articles, if any

1837.
LATIMER
v.
NEATE.

* Turn. & R. 87. † 2 Sim. & S. 309. ‡ 5 Mad. 16.

1837.

LATIMER
v.
NEATE.

thing, is an argument at law, and may be made available in the action. If the possession is such as to give a right to the Respondent, it is a case at law, and equity has no jurisdiction; but this question as to the effect of possession, has been decided in *Latimer v. Batson**, and another case to the same effect, *Martindale v. Booth*†, *Sparke v. Montriou*.‡

The Plaintiff's right to production of documents is on two grounds:—1. Where by reference they are made part of the Defendant's answer: 2. Where the Plaintiff can shew from the answer that he has an interest in the documents sought to be produced.

This interest may be either direct, in which case the Court orders production with a view to the security of the document; or it may be an interest for the purposes of the suit; *i. e.* the documents may be material to the proof of the Plaintiff's case; thus they become part of that discovery which the Plaintiff in equity has a title to.

Documents, therefore, which *constitute the Defendant's evidence in defence merely*, production ought not to be compelled.

To entitle himself to such production, the Plaintiff must show an interest in the documents in question *for the purposes of discovery in the suit*. The cases where the plaintiff impeaches the instrument are of a distinct character; as *Beckford v. Wildman*§, *Balch v. Symes*||, *Tyler v. Drayton*¶, *Kennedy v. Green*.**

* 4 B. & C. 652.

† 1 Yo. & C. 103.

|| 1 T. & R. 87.

** 6 Sim. 6.

† 3 B. & Ad. 498.

§ 16 Ves. 438.

¶ 2 Sim. & St. 309.

There are other cases where the instruments are referred to as part of the answer; *Hardman v. Ellames*.*

A third class of cases are those like the present, where production of deeds *being merely the Defendant's defence or evidence* has been refused. *Lady Shaftesbury v. Arrowsmith*†, *Bligh v. Benson*‡, *Wilson v. Forster*§, *Compton v. Earl Grey*||, *Sampson v. Swettenham*.¶

For the Respondents, Mr. *Temple* and Mr. *Ellison*.

The Respondent has an interest in the property comprised in the deeds, and therefore in the deeds themselves. By the schedules to the answer, it appears that the Appellant is servant and agent of the Duke. In the second schedule, he gives an account of payments. It is objected that the document in question is evidence of the Appellant's title; but there is a clear distinction between title deeds and mortgage deeds. *Ex parte Caldecot***, *Postlethwayte v. Blythe*.††

A party claiming as a purchaser for a valuable consideration must make out his character by his deeds; and it must appear that he acted *bonâ fide* throughout, and that he paid his purchase-money before notice express or implied. As to *Tyler v. Drayton*, Lord Eldon says, "A deed impeached on the ground of fraud must at some period be produced. As to *Kennedy v. Green*, it did not appear that the purchase was without notice. The conduct of the party is always a material part of the question.

* 2 M. & K. 732.

§ 1 Younge, 280.

** Mont. 55.

† 4 Vesey, 66.

|| 1 Y. & J. 154.

†† 2 Swan. 256.

‡ 7 Price, 205.

¶ 5 Madd. 16.

1837.

LATIMER

D.
NEATE.

Here the Defendant did not at first put in a full answer ; whether he gave consideration for the assignments, he did not answer at all ; but to screen himself from discovery, insisted that they were his title deeds, and that he was not bound to answer. By such conduct he has forfeited all title to protection. It is one of the great principles of equity to prevent multiplicity of suits ; for which purpose alone the Courts will entertain a question, and on the same grounds, will prevent delay and expense in every suit. The consequence of a reversal of this decree would be, that the bill must be amended to put more ample interrogatories ; whereas, if the case as represented by the Appellant be true, he cannot be injured by the production of the documents.”

April 25.
1837.

The Lord Chancellor. — My Lords, if in my opinion the case before your Lordships involved the consideration of some of the arguments which have been addressed to your Lordships, I should think it a case of considerable importance ; but in my view of the case, of the proceedings which have taken place in the Court below, and the proceedings before your Lordships, it does not appear to me that it is at all necessary to enter into the consideration of some of those most important questions which have been discussed. It has been properly admitted on the part of the counsel for the Appellant, that if it appears from the whole of the pleadings that the title claimed by the Defendant is, in fact, only a mortgage title, and that the Plaintiff has so framed his record as to entitle him to deal with that mortgage title and redeem it, he

would not, at your Lordships' bar, argue that, under the circumstances, he could resist the right of the Plaintiff to have production of the documents.

1837.

 LATIMER
 v.
 NEATE.

The bill is certainly not framed exactly in that form in which one usually sees bills framed which ask to make an absolute conveyance available for the purpose of securing a mortgage debt. The equity to which the Plaintiff is entitled, however, may be determined on this record.

The Plaintiff alleges that he is a judgment creditor of the Duke of Marlborough; that a writ of execution was delivered to the sheriff; that the sheriff has returned *nulla bona* with respect to the property on which the Plaintiff supposed he had a right to have that debt levied. The case made by the bill is, that at various times and by various deeds, the dates of which are mentioned, the Duke of Marlborough assigned to the Defendant, without consideration, as the Bill alleges, the property in question. It then alleges that by a transaction with Richardson, who had a title to a debt as against the Duke of Marlborough, the Defendant obtained possession and a title to certain property for the purpose of securing a debt of 700*l*. The bill challenges the legal title under assignment, although it does not question the title of the Defendant to stand in the place of Richardson to the extent of that debt, an assignment of which he has obtained from Richardson. Then the bill after so stating the case, alleges "that the Respondent
 " (that is the Plaintiff) now is and has always
 " been ready and willing to pay to the Appellant
 " what, if any thing, is due to him from the Duke

1837.


 LATIMER
 v.
 NEATE.

“ of Marlborough, upon the security of the said
 “ goods and chattels.” And then it prays “that it
 “ may be declared that all the bills of sale and as-
 “ signments of the goods and chattels in and upon
 “ the said mansion-house, estate, and premises at
 “ Blenheim, made and executed by the said Duke of
 “ Marlborough to the Appellant, were void as against
 “ the Respondent, and that the same ought to be
 “ delivered up by the Appellant to be cancelled, and
 “ that the same might be ordered to be delivered up
 “ and to be cancelled accordingly; and that it might
 “ be referred to the Master to take an account of
 “ what was due from the Duke of Marlborough to
 “ the said Respondent upon the said judgment, and
 “ for his debt and damages and costs, and also to
 “ take an account of all pecuniary dealings and
 “ transactions between the said Duke of Marlbo-
 “ rough and the Appellant since the beginning of
 “ the year 1823 inclusive; and if the said Master,
 “ upon taking the said last-mentioned account, should
 “ find a balance to be due from the Duke of Marl-
 “ borough to the Appellant, in that case he might
 “ be directed, attending to the declaration aforesaid,
 “ to inquire and state whether the Appellant then
 “ had any lien or security for the payment of the
 “ whole or any part of the said balance upon all or
 “ any part of the said goods and chattels in and upon
 “ the said mansion-house, estate, and premises at
 “ Blenheim, the said Respondent thereby offering to
 “ pay to the Appellant what, if any thing, should be
 “ found in manner aforesaid due to him from the
 “ Duke of Marlborough.”

Now, I apprehend that if, upon the hearing, it
 appeared that there were assignments made, without
 consideration, from the Duke of Marlborough to

the Defendant, and that there was also an equitable lien existing in the Defendant against the property of the Duke of Marlborough's estate to be affected by the Plaintiff's execution; that although the Court might be of opinion that the assignments were void for want of consideration, that the Defendant having an equitable mortgage on the property, the decree of the Court would be to do away with those assignments so far as they were transfers of the property, but let the Defendant have the benefit of them for the purpose of securing the debt due to him from the Duke of Marlborough. If the record, therefore, is so framed that the Plaintiff, being a judgment creditor, had a right to redeem the Defendant, and to put himself in the place of the mortgagor, the Duke of Marlborough, it is not very material whether the bill is framed precisely in those words, and containing those statements and that prayer which might be the most usual and technical mode of stating such a case.

1837.

 LATIMER
 &
 NEATE.

The Defendant, in his first answer, says that he holds adversely against the Plaintiff; he sets out the several deeds, and says he claims to be the legal owner under and by virtue of several bills of sale, and he gives the dates; all which said bills of sale, assignments, and legal instruments, he says, were duly executed to him for a full and valuable consideration. It is impossible to read that passage in the answer without seeing that the Defendant meant to represent that he was the actual purchaser; he states the deeds to be actual assignments of the property to him, and that they were assignments for a full and valuable consideration. But then in a subsequent part of the answer

1837.

LATIMER
v.
NEATE.

he states, “ that the said Duke was then indebted
“ to the Appellant as a judgment creditor and
“ equitable mortgagee to the amount of upwards of
“ 8000*l.*, and that all the securities which had been
“ obtained by the Appellant from the Duke of
“ Marlborough, and all of which were then in the
“ Appellant’s possession or power, were a very
“ scanty and insufficient security for the payment
“ of the said debt.” And then he says, “ that as
“ between the Appellant and the said Defendant,
“ the Duke of Marlborough, he only claimed in
“ equity to be a mortgagee or to have a lien on all
“ the said goods and chattels, to secure payment
“ of the said debt of 8000*l.* and upwards, then due
“ and owing to him from the said Defendant, the
“ Duke of Marlborough ; and that all the said
“ goods and chattels which were comprised in all
“ the said bills of sale, assignments, and legal in-
“ struments, and comprising all the said goods
“ and chattels on the said premises at Blenheim,
“ which were not heir-looms, and which did not
“ belong to the trustees of the late Duke of
“ Marlborough’s will, were a very scanty and in-
“ sufficient security for the payment of the said
“ debt, and that the equitable interest of the De-
“ fendant, the Duke of Marlborough, in the said
“ goods and chattels in and upon the said mansion-
“ house, estate, and premises at Blenheim, was not
“ a beneficial or valuable interest.”

It was represented at the bar that the meaning of the Defendant was, that although he, the Defendant, was intitled to insist on the absolute ownership of the goods by virtue of the assignments, that he was willing to consider himself as only having a charge to secure the payment of the debt. It is no wonder

that the Plaintiff, seeing such an answer, was desirous of some further discovery from the Defendant, that he might be able to ascertain whether he had only a mortgage title which would entitle the Plaintiff to come into a Court of Equity and place himself in the situation of the Duke, so as to work out his own debt; and accordingly exceptions were taken, and in the further answer the Defendant refers to a schedule containing a more accurate description of the assignments. He says, "that he (the Appellant), in the first schedule to "that his answer annexed, and which, together "with the other schedule thereunto annexed, he "prayed might be taken as part of his said answer, "has set forth to the best and utmost of his knowledge, information, remembrance, and belief, an "account or description of all and every the said "bills of sale and assignments, or bill of sale and "assignment of the said goods, chattels, and personal estate;" and goes on with the enumeration of the particulars which he states he had set out in his answer.

In the first answer, in stating the assignments under which he claims, he sets forth, amongst others, one of June 1829, one of June 1832, May 1833, and one of June 1833. Being called on, by the exceptions, to state more particularly what were the nature, contents, and particulars of these assignments, he, in the second answer, swears he has done so, when it appears that there is no deed stated beyond the date of the 1st of June, 1829. Why he has omitted those three subsequent deeds he does not explain; but it appears, in his second answer, that he has sworn that he has set out all the deeds under which he claims as against the

1837.

LATIMER

v.

NEATE.

Plaintiff, and, therefore, it must be assumed he has no other deeds but those he has so stated in the schedule. Now if the Defendant was entitled to that protection against discovery which he now seeks to enforce at the bar, the order of the Court of Exchequer was clearly wrong in allowing those exceptions : because a Defendant may be bound to state in his answer and describe the documents ; he may be compelled to admit he has such documents in his possession, but not compellable to state the contents, if he is entitled to protect himself by any rule which prevents a Plaintiff asking for the production of the document. If he professes to set out the document, the Plaintiff has a right to see whether he has stated it correctly or not. Therefore, to protect himself against the liability to produce the document, he should take his stand on the interrogatory, which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, I have the deeds in my possession, but you do not entitle yourself, by the proceedings, to see the contents of the documents. If the Defendant chooses to pretend to give a discovery, the Plaintiff is not bound to take that representation, but is entitled to see the documents.

Now, I find that the schedule is an abstract of all those deeds ; it is not a mere statement of such a deed of such a date between such parties, which would leave the Plaintiff entirely in the dark as to the contents ; but he sets out what is quite sufficient for ordinary purposes, — whether truly abstracted or not is a point which the Plaintiff has a right to be satisfied of. But when I look to the schedule, which is the most im-

portant part of the papers, and which is the only part not printed, I find a statement of the prior deeds, which are immaterial from the mode in which the last deed deals with those prior deeds. The deed of the 1st of June, 1829, recites the prior deeds, and then there is the proviso, as to the property comprised in those deeds, and in this last deed : it seems uncertain, on the face of it, whether it embraces all or not, but, at all events, it is subject to the redemption of certain parts.

The last deed, which is for further security, is of August, 1832 ; and reciting that the now recited indentures were only “for the better securing the said
“sum of 1800*l.* and interest, so due and owing to
“him as aforesaid ; It was witnessed, that in consi-
“deration of the premises, and for better securing
“payment of the said sum of 1800*l.* and interest,
“so due and owing from the said Duke to the said
“Edward Latimer as aforesaid, and also in consi-
“deration of 10*s.* to the said Duke, paid by the
“said Edward Latimer at the time of executing
“these presents, he, the said Duke, had bargained,
“sold, assigned, transferred, and set over unto the
“said Edward Latimer, his executors, administra-
“tors, and assigns, all the several cattle, wines,
“books, musical instruments, plants, goods, chat-
“tels and effects, in the inventory thereunder writ-
“ten particularly mentioned, being in and about
“the mansion-house, gardens, stables, grounds,
“and park of Blenheim, of which the said Duke
“had delivered to the said Edward Latimer full
“and actual possession : Proviso, that the now
“abstracting indenture was only intended for fur-
“ther and better securing the payment of the said
“sums of 1800*l.* and interest ; and that if the said

1837.

LATIMER

v.

HEATH.

1837.

LATIMER

v.
NEATE.

“ Duke, his executors, or administrators, should
“ pay, or cause to be paid, the same to the said
“ Edward Latimer, his executors, administrators,
“ or assigns, on the 8th day of May then next
“ ensuing, that indenture should cease and deter-
“ mine.”

There is, therefore, no question but that the title of the Defendant on his title deed is only a mortgage title; and it is equally free from doubt, according to my view of the pleadings, that the Plaintiff is entitled to redeem that mortgage upon the payment of what may be found due, not being precluded from that right by the mode in which he states his case — the object of the deeds being not to give an absolute title to this property against the Duke, or those who claim under the Duke, but for the purpose of securing a sum of money due from the Duke to Latimer.

On these two grounds, therefore, I think your Lordships may safely affirm the order of the Court below — the first, that this is a case in which the Plaintiff is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the Defendant has set up as an absolute title; and, secondly, because the Defendant having set out what he states as the contents of the deed, (and most likely fairly) the Plaintiff, under those circumstances, is entitled to see whether the abstract be or not a correct abstract of those deeds of which he asks the production. I therefore suggest that the order of the Court below be affirmed.

Lord Brougham. — I entirely agree with my noble and learned friend that there can be no doubt whatever in this case. It is to be regretted

that the schedule was not printed; if it had been so we should have seen, earlier in the day, the points in the case, and a considerable part of the arguments might have been spared and much time saved. I ought to add that, in the cases which have been cited, there is nothing that goes against this decision. I do not think the points arise to which the arguments in those cases were mainly applied. I cannot help wishing that, in the peculiar circumstances of the case, an application had been made to the House to forward the hearing of this appeal. If this appeal had been heard, (the *venue*, I take it for granted, being in Oxfordshire,) the cause might have been tried at the last Spring assizes. The order was made in July, 1836; the appeal I suppose was lodged as early as possible, and I have no doubt that there would have been no objection on the part of the appeal committee, your Lordships acting on their report, to have so sped the hearing as to have enabled the parties to go on with the action at the last assizes. Probably the parties thought they could not have been in time to have done that, though I have no doubt the application would have been granted if it had been made. Of course your Lordships will dismiss this appeal with costs.

Order affirmed with costs.

1837.

LATIMER

v.

NEATE.

SST.

THE EAST INDIA COMPANY

V. JOHN CAMPION, and DAVID COLVIN, WILLIAM CRAWFORD, and JAMES GATHORNE REMINGTON,

ENGLAND.

(COURT OF CHANCERY.)

The EAST-INDIA COMPANY - *Appellants*;JOHN CAMPION, and DAVID COLVIN, WILLIAM CRAWFORD, and JAMES GATHORNE REMINGTON, } *Respondents.*

By the statute 54 Geo. 3. c. 36. the East India Company are empowered in certain cases to sell, on account of the owners, merchandize the produce of any place within the limits of their charter, and imported in private trade, and out of the produce of the sale to pay the duties of excise and custom, and the rates, &c. payable to the East India Dock Company; and it is provided that the owners of the vessel from which the merchandize was taken should have the same lien for the freight thereof upon the net proceeds as they would have had upon the goods before the landing, if they should have given notice of their claim before the net proceeds should have been handed over to the consignees or owners of the goods.

Under the authority of this act the East India Company took possession of certain bales of cotton wool, which had been consigned from Calcutta to B. & Co. In April, 1818, a notice was served upon them by C., as the managing owner of the ship in which the cotton had been imported, claiming 560*l.* for freight due to the owners of the ship. In May, 1818, a notice was served upon the E. I. Company by B. & Co., stating that they held bills drawn for the freight of part of the goods, and requesting them to retain certain funds out of the proceeds, and not to pay them to C. until it should have been decided to whom the freight was due.

The cotton wool was afterwards sold by the E. I. Co., and produced 5577*l.* 12*s.* 3*d.* Out of this sum the E. I. Co. paid to B. & Co. 2000*l.*, and to C. 849*l.* 5*s.* 10*d.*, the amount of the freight of the cotton wool and other goods comprised in the same bill of lading, leaving a balance of 2585*l.* 0*s.* 10*d.* in their

hands. This balance B. & Co. claimed, for advances made to the consignor of the goods by whom the ship had been chartered. On the other hand, C., on behalf of the owners of the ship, claimed a lien on the balance to the amount of 1908*l.* 3*s.* 8*d.* with interest, for freight; and the E. I. Co. having declined to satisfy that demand, C. brought an action against them to recover it. The E. I. Co. then filed a bill of interpleader against B. & Co. and C. and the assignees of the consignor, who had become bankrupt. The bill stating the facts, and offering to pay the balance into court, prayed an injunction, &c.

1837.

 THE EAST-INDIA
 COMPANY
 v.
 CAMPION.

C. by his answer admitted the facts stated in the bill, except that the 2000*l.*, part of the proceeds of the sale, had been paid to B. & Co. with his consent, which he denied; and as to the balance in the hands of the plaintiffs, he claimed the greater part thereof, viz. 1746*l.*, as the balance due to him under the charter-party, with interest and costs. B. & Co. by their answer contended, that by the charter-party of affreightment, under which C. claimed, provision was made for payment of the freight by bills of exchange, and that C. had no lien for freight upon the return cargo. The assignees of the consignor disclaimed.

Shortly after the filing of the bill the balance was paid into court, under an order obtained by the plaintiffs; and by a subsequent order obtained by C., it was invested in the purchase of 2718*l.* 14*s.* 3*d.* 3 per cent. consolidated bank annuities.

By the decree made upon the hearing of the cause, an issue was directed to try whether C. and his partners, as owners of the ship, had a lien on the cotton wool for freight, beyond the freight due in respect of the cotton wool; and that the costs of the plaintiffs should be paid by sale of a sufficient part of the stock in which the balance had been invested; and all farther directions were reserved. Under this decree the costs were paid to the plaintiffs, and various proceedings at law and in equity were carried on between the co-defendants; to which the plaintiffs were neither parties or privy. (See Vol. 8. p. 523.)

In 1836, C. having obtained a verdict upon the issue, and judgment upon a special case at law, brought on the cause for hearing upon further directions in equity; having served the plaintiffs with notice, upon which they did not appear; and upon the hearing before the Vice-Chancellor, it was referred to the Master to take an account of what was due to C. under the charter-party, with interest and costs; and it

1837.

THE EAST-INDIA
COMPANYv.
CAMPION.

was declared that C. had a lien for the amount on the sum of 2000*l.* paid by the plaintiffs to B. & Co.; and that the plaintiffs (the E. I. Co.) should pay 2000*l.* into the Bank to the credit of the cause, subject to further order, &c.

Upon appeal by the E. I. Co. against this order, it was reversed.

THIS was an appeal from part of a decretal order, dated the 23d day of July, 1836, pronounced by his Honour the Vice-Chancellor, on the hearing for further directions, of a suit of interpleader, pending in the Court of Chancery, wherein the Appellants were the Plaintiffs, and Richard Campbell Bazett and John Farquhar, since respectively deceased, and the above-named Respondents, were the Defendants.

By this order it was (among other things) directed that the Appellants should pay into Court, to the credit of the cause, subject to further order, a certain sum of 2000*l.* in the pleadings mentioned. This sum of 2000*l.* formed, however, no part of the subject of interpleader in the suit, which was confined to a sum of 2585*l.* 0*s.* 10*d.* Both sums were parts of the proceeds of 511 bales of cotton-wool, which came to the hands of the Appellants, and were sold by them at one of their public sales, in the year 1818, under the circumstances hereinafter stated.

By an act of parliament made and passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intituled “ An act for
“ amending and enlarging the powers of two acts
“ made in the forty-third and forty-sixth years of
“ his present Majesty, for the further improve-
“ ment of the port of London, by making docks
“ and other works at Blackwall, for the accom-

“modation of the East India shipping in the said “port,” the Court of Directors of the Appellants, or some officer or officers appointed by them for that purpose, were required in certain cases therein mentioned, to cause such merchandize, the produce of any place within the limits of the charter of the Appellants, as should be brought into any of the docks or basins therein mentioned, on board of any vessel, to be entered at the custom-house, and to give security for the payment of the duties to which the same should be subject. And it was thereby enacted, that all vessels arriving in the inner dock should be cleared and discharged with all convenient speed, and merchandize imported in private trade, which should be landed therefrom, and which should be bonded by the Appellants, or otherwise howsoever, and which were prohibited goods, should without loss of time, unless in the case therein mentioned, be deposited in the warehouses of the Appellants, and should be sold under the authority of the said Court of Directors on account of the owners; and the duties of custom and excise, and the rates, charges, and expences payable to the East India Dock Company in respect of the same, were to be deducted and paid to the proper officer of his Majesty’s revenue, and to the said East India Dock Company, by the Appellants, subject, however, to the proviso therein mentioned: and it was thereby provided that the master and owner or owners of any vessel from which any such goods should have been landed, should have the same lien for the freight thereof upon the net proceeds, as they would have been entitled to upon the same goods before the landing thereof, if he or

1837.

THE EAST INDIA
COMPANY
v.
CAMPLION.

1837.
 THE EAST INDIA
 COMPANY
 v.
 CAMPBELL

they should give notice in writing of his or their claim to lien, before such net proceeds should have been paid over to the consignees or owners of such goods.

In the month of May, in the year 1818, the ship *Hero*, then engaged in private trade to and from the East Indies, and of which the Respondent, John Campion, was the managing owner, arrived in the East India Docks, having on board an assorted cargo, the several parts of which had been shipped and consigned by different persons in the East Indies to different persons in England. One of these consignments consisted of the 511 bales of cotton-wool hereinbefore mentioned, which had been shipped at Calcutta, and consigned to Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, who then carried on the trade or business of merchants in London, in co-partnership, under the firm of Bazett, Farquhar, Crawford, and Co.

Under the provisions of the act of parliament the cargo of the ship was landed, and was deposited in the warehouses of the Appellants; and shortly after the arrival of the ship, Richard Campbell Bazett and his partners, as consignees, claimed to be entitled to the 511 bales of cotton-wool; but on the 22d of April, 1818, the Respondent, John Campion, gave notice to the Appellants of a claim of lien upon the cargo, including the 511 bales of cotton-wool, for the freight thereof, and such notice was given by a letter of that date, addressed by the same Respondent to Mr. Charles Cartwright, then accountant-general of the Appellants, and it was as follows:—“ I, the undersigned, being the managing owner of the ship

“ Hero, Price, master, from Bengal, do hereby
 “ give you notice, that after the delivery of the
 “ cargo of the said ship into your hands, you do
 “ not part with or deliver the same out of your
 “ possession, to any person or persons whomsoever,
 “ without my authority and permission, unless on
 “ payment to you for my use, or for the use of
 “ myself and co-owners of the said ship, of the
 “ freight due to me for and in respect of the
 “ said ship’s late voyage from Bengal aforesaid,
 “ amounting to the sum of 5605*l.* 5*s.*, and you are
 “ hereby held responsible for the same. And I
 “ further give you notice, not to part with the said
 “ goods, or the proceeds thereof, until you collect
 “ and receive the same freight in the following
 “ manner, viz.—First, that you retain the goods
 “ as specified in the particular subjoined, marked
 “ No. 1, or the proceeds thereof, for payment of
 “ the freight of the said last-mentioned goods, and
 “ that you retain the said last-mentioned freight.
 “ Secondly, that you retain the goods, or the
 “ produce of the sale thereof, specified as No. 2,
 “ the same goods being the propeaty of John
 “ Burton Gooch, the charterer of the said ship,
 “ until the whole of the said sum of 5605*l.* 5*s.* is
 “ paid to me, or received by you for my use; and
 “ Thirdly, if the amount of the said freight under
 “ No. 1, and the value or produce of the sale of
 “ the said goods under No. 2, shall be insufficient
 “ to liquidate the freight due to me, then that you
 “ retain and hold the freight of goods specified as
 “ No. 3, according to the amounts thereby set
 “ forth, until full payment and satisfaction is made
 “ to me of the said sum of 5605*l.* 5*s.* And like-
 “ wise I give you notice, that in delivering the

1837.

THE EAST INDIA
 COMPANY
 S.
 CAMPION.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

“ said cargo into your hands, the right of lien for
“ the freight of the said ship, so insisted on, is
“ not thereby relinquished or waived, and that if
“ you shall sell the same cargo, or any part thereof,
“ you are, out of the proceeds arising from the
“ sale, to retain in the order and course, and for
“ the use and purpose aforesaid, the said sum of
“ 5605*l.* 5*s.* (Signed) JOHN CAMPION.”

In the partticulars subjoined to the notice, the 511 bales of cotton-wool were among other goods comprised under No. 2; and in the same particular the Respondent, John Campion, stated, that such 511 bales of cotton-wool were among other things “ contained in a bill of lading to Bazett, “ Farquhar, and Co., and for the freights of which “ no bill has been drawn, although the bill of “ lading states, freight for the said goods paid by “ bills on London.”

On the 18th of May, 1818, the said accountant-general, Mr. Charles Cartwright, received a letter from Richard Campbell Bazett and his partners, which was as follows:— “ Sir, understanding “ that you have received a letter from Mr. John “ Campion, who as owner of the Hero, Captain “ Price, from Calcutta, requests you to withhold “ payment of the proceeds of the cargo of that ship, “ committed by the consignees to the care of the “ Honourable East India Company, for sale, until “ he is satisfied for the freight, amounting to “ 5605*l.* 5*s.*, we beg to apprise you, that we hold “ the bills drawn for the freight of this cargo, and “ annex you a list thereof, with the particulars of “ the goods for which the bills of lading are signed “ by Captain Price, freight for the said goods be- “ ing paid by bills, amounting in the whole to

“ 2644*l.* 1*s.* 10*d.*, which as far as it goes, will, we
 “ believe, correspond with a list annexed to the
 “ letter to you signed by Mr. Campion. There are
 “ also landed from this shipment to our consign-
 “ ment,

“ I. B. G. 489 bales, } Cotton-wool.
 22 half-bales, }

“ I. B. G. }
 “ B. E. G. & Co. } 21 bales, Safflower.
 “ Safflr. }

“ For the freight of which no bills have been drawn,
 “ and the proceeds of which, we conceive, will be
 “ much more than sufficient to cover the deficit of
 “ the sum claimed by Mr. Campion, beyond the
 “ amounts claimed in the annexed lists. These
 “ proceeds we are willing should be retained by
 “ you, as well as request you to retain the several
 “ sums in the annexed list from the proceeds of the
 “ sale of the different goods, but not to be paid to
 “ Mr. Campion, until it shall have been legally
 “ decided to whom such freight is strictly due.”

The 511 bales of cotton-wool, before-mentioned,
 were the same bales as in the last-mentioned
 letter are described as 489 bales and 22 half-
 bales.

In performance of the obligations imposed upon
 the Appellants by the act of parliament, the 511
 bales of cotton-wool were afterwards sold by
 them, and produced the sum of 5577*l.* 12*s.* 3*d.*,
 and the Appellants, after paying thereout the duties
 and charges incident thereto, on the 19th of Sep-
 tember, 1818, paid to the firm of Bazett, Farquhar,
 Crawford, and Co. the sum of 2000*l.* on account
 of the said monies; and in or about the month of
 August, 1821, they also paid to the Respondent,

1837.

THE EAST INDIA
 COMPANY
 v.
 CAMPION.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

John Campion, the sum of 849*l.* 5*s.* 10*d.*, for or on account of freight; and after such respective payments, the sum of 2585*l.* 0*s.* 10*d.*, residue of the said sum of 5577*l.* 12*s.* 3*d.*, then remained as a balance in the hands of the Appellants.

The Appellants were unable to discharge themselves of this balance, by reason of the conflicting claims of the said several parties. The Respondent, John Campion, claimed as owner of the ship to be entitled to the sum of 1,908*l.* 3*s.* 9*d.*, part thereof, for the freight of the cargo, together with interest thereon from the delivery of the cargo to the Appellants in the year 1818, and Richard Campbell Bazett and his partners claimed to be entitled as consignees to the whole of the said balance.

In Trinity term 1823, the Respondent, John Campion, commenced an action at law against the Appellants in the Court of King's Bench, to recover from them the said sum of 1908*l.* 3*s.* 9*d.*, with interest thereon from the year 1818, and declared in such action; whereupon the Appellants, who claimed no interest in the monies in their hands, and who were unable to determine to which of the claimants the same belonged, or in what proportions, filed their bill of interpleader, on the 16th of June, 1823, against the Respondent, John Campion, and the other Respondents hereto, and their partners, Richard Campbell Bazett, and John Farquhar, setting forth the facts before stated, and further stating, among other things, that the sum of 2000*l.* was paid by the Appellants to Richard Campbell Bazett and his partners, with the consent of the Respondent, John Campion, and that the sum of 849*l.* 5*s.* 10*d.* was paid by the Appellants to the

Respondent, John Campion, with the consent of Richard Campbell Bazett and his partners; and thereby praying that the Defendants thereto might interplead and settle their claims and demands amongst themselves, the Appellants being willing, and thereby offering to pay the sum of 2585*l.* 0*s.* 10*d.* to such of the Defendants as should appear to be entitled thereto, and to bring such sum of 2585*l.* 0*s.* 10*d.* into court, subject to the further order thereof; and that John Campion might be restrained by the injunction of the Court from further proceedings in the said action at law, already commenced by him against the Appellants, and from all other proceedings at law against them, touching the matters aforesaid or any of them; and that the other Defendants might be respectively also restrained, by the order and injunction of the Court, from all proceedings at law against the Appellants, touching the said sum of 2585*l.* 0*s.* 10*d.*, or any part thereof, or the matters aforesaid, or any of them.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

The Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, by their answer to the bill, which was filed in the month of November, 1823, set forth among other things, the grounds upon which they rested their claim to the whole of the sum or balance of 2585*l.* 0*s.* 10*d.*, and admitted that the Appellants did, on or about the 9th of September, 1818, with the consent of John Campion, pay to them, on account of the proceeds of the sale of 511 bales of cotton-wool, the sum of 2000*l.*, and that the same Defendants did threaten and intend to commence such proceedings at law against the Appellants as they should be

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

advised, touching the sum of 2585*l.* 0*s.* 10*d.*, unless they should be restrained from so doing by the injunction of the Court; and they submitted that they were entitled to have the said sum of money paid over to them, under the circumstances and for the reasons therein mentioned.

The Respondent, John Campion, by his answer, which was filed on the 3d of January, 1824, among other things, admitted that the ship called the *Hero* sailed from the river Hooghly, destined to the port of London, having on board a cargo consisting of different sorts of goods, wares, and merchandizes, shipped and consigned by different persons in the East Indies to different persons in England, and that the ship arrived at the port of her homeward-bound voyage in the East India Docks some time in the year 1818, and that there were on board of the said ship, at the time of her arrival in the said docks, 511 bales of cotton-wool, which had been shipped on board her at Calcutta, and consigned to Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington; which 511 bales of cotton-wool the Respondent thereby stated, he believed were the property of John Burton Gooch, the charterer of the ship. That the said ship was chartered by John Burton Gooch from the Respondent, John Campion, for her said voyage outwards and homewards, by a regular charter-party duly executed, and that a considerable balance was due to him on such charter-party; but that although he, the said Respondent, was alone party to the said charter-party, he was not the sole owner, but that the said vessel belonged to him and his brothers. That the goods

which were brought into the docks by the said ship were, under the provisions of the said act of parliament, landed from such ship or vessel, and sent to and deposited in the warehouses of the Appellants, and that shortly after the arrival of the said ship the other Defendants claimed to be entitled to the said 511 bales of cotton-wool, as consignees; that he, and as he believed, the other Defendants to the said bill, respectively sent such notices and letters as in the said bill are mentioned; and that the 511 bales of cotton-wool were afterwards sold at the Appellants' public sale, for such sum of money as in the said bill mentioned.

The Respondent, John Campion, also stated, that he believed the Appellants, on or about the 9th of September, 1818, paid to the other Defendants to the bill, the sum of 2000*l.* on account of the aforesaid sales; but denied it to be true, that the payment was made with his consent: and he admitted, that the Appellants paid to him the sum of 849*l.* 5*s.* 10*d.*, by and out of the proceeds of the said sale, but he could not set forth whether, after making such respective payments as aforesaid, the sum of 2585*l.* 0*s.* 10*d.* only, or what other sum, remained as a balance in the hands of the Appellants, further than that he supposed that the same was the amount, or nearly the amount, of such balance; and he denied that the Appellants were ready and willing to pay such sum or balance of 2585*l.* 0*s.* 10*d.* to the party entitled thereto, for that he, the said Respondent, John Campion, being entitled to the greatest part thereof, as thereafter mentioned, requested the Appellants to pay the same, or so much thereof as he was entitled to, to him, offering at the same time to give them ample

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

indemnity for any loss they might sustain by having paid the same to him, but that the Appellants refused to pay the same to him notwithstanding such offer of indemnity, and that he was informed, on making such application, that they would not pay the same to him upon any indemnity whatsoever: and he stated, that he believed the sum of 2585*l.* 0*s.* 10*d.*, or some much larger sum of money, still remained in the hands of the Appellants; and admitted, that the other defendants to the said bill, as such partners and consignees as aforesaid, claimed to be entitled to the same. And under the charter-party of the said ship, he claimed to be entitled to receive out of the proceeds of the said cotton-wool belonging to John Burton Gooch, so sold by the Appellants as aforesaid, the sum of 1746*l.* 13*s.* 8*d.*, as the balance due under the said charter-party, together with interest thereon from the time that such balance became due, according to the terms of the said charter-party, together with all the costs which he had incurred, and might thereafter incur, both at law and in equity, in respect of such his demand; and he denied that he refused to interplead, or to settle and adjust his claims with the other Defendants, but that he was anxious to recover the said sums of money, which had remained due to him ever since the year 1818. And he admitted, that for that purpose he had, in or as of Trinity term then last past, commenced an action against the Appellants in the Court of King's Bench, for the purpose in the said bill mentioned, and that he had declared in such action, and intended to proceed to trial, judgment, and execution in such action against the Appellants, unless restrained by the injunction of the Court; and he

submitted, that he ought not to be restrained from proceeding in his said action, but that the said other Defendants ought to be ordered to defend the same.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

On the 24th of July, 1823, the Appellants applied for and obtained in the said cause, upon notice, an order of the Court of Chancery, whereby it was ordered, that the Appellants should pay into court, to the credit of the cause, the sum of 2585*l.* 0*s.* 10*d.*, which payment into court the Appellants accordingly made on the 21st of August, 1823; but the order of the Court for laying out and investing such sum, after the same had been paid in, and accumulating the dividends in the usual way, (which order was obtained by the Respondent, John Campion,) was not obtained until the 9th of December, 1824.

On the 31st of January, 1824, the Appellants also applied for and obtained, upon notice, an order of the Court of Chancery, whereby the Respondent, John Campion, was restrained from all further proceedings in his action at law against the Appellants, until further order; and by virtue of such order of the 31st of January, 1824, the proceedings in the action were stayed.

The Appellants brought the cause to a hearing, and by the decree made on the hearing thereof before his Honour the Vice-Chancellor, bearing date the 17th of April, 1826, it was ordered, that the parties should proceed to a trial at law in his Majesty's Court of Common Pleas at Westminster, on the following issue (that is to say), whether John Campion and his partners, or any of them, as owners of the ship *Hero*, in the pleadings mentioned, had a lien on the 489 bales and 22

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

half-bales, for freight, beyond the freight due in respect of the cotton-wool, under the bills of lading thereof: and in such issue John Campion was to be Plaintiff at law, and the Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, were to be Defendants at law. And it was ordered, that the Master should tax the costs of the Appellants, and that the same, when taxed, should be paid out of the fund in court, consisting of 2718*l.* 14*s.* 5*d.* Bank 3 per cent. annuities, as therein mentioned.

Under this decree, the costs of the Appellants were taxed and paid: in the month of April, 1827, a trial was had of the issue directed by the decree, and a verdict was found for the Respondent, John Campion, the Plaintiff at law; on the 26th of June, 1827, an order was made in the cause by his Honour the Vice-Chancellor, upon the application of the Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, whereby a new trial was directed, but by a subsequent order made upon the application of the Respondent, John Campion, and bearing date the 30th of July, 1831, the order for a new trial was discharged, in consequence of the delay of the other Defendants to the bill in proceeding under the same, and on the 15th of February, 1832, the cause came on to be heard upon further directions, on the footing of the verdict, before his Honour the Master of the Rolls; and by the decree then made, it was referred to the Master in rotation, to take an account of what was due to John Campion, under and by virtue of the charter-party in the pleadings mentioned; and it

was further ordered, that the Master should compute interest thereon after the rate of 5% per cent. per annum, from the 1st of September, 1818, being four months from the day of the arrival of the ship *Hero*, in the charter-party mentioned, in the river Thames, and being the time when the bills of exchange to have been drawn for the amount would have been due. And by the decree, after providing for payment to the Respondent, John *Campion*, of what should be found due to him on the said account out of certain funds in Court, it was ordered, in case the same should be insufficient to pay the amount found due, that the deficiency should be paid by Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, out of the sum of 2000*l.* received by them out of the proceeds of the sale of the cotton-wool, in the pleadings mentioned. The Respondents, David Colvin, William Crawford, and James Gathorne Remington, having survived their partners, the Defendants, Richard Campbell Bazett and John Farquhar, appealed to the House of Lords against the decree on further directions, and also against the order of the 30th of July, 1831, discharging the order for a new trial, and against another order dated the 18th of January, 1832; after the hearing of the appeal, an order was made by the House of Lords, dated the 12th of August, 1834, whereby it was amongst other things ordered and adjudged, that the parties should proceed forthwith to a new trial of the issue. And it was further ordered, that John *Campion* should have liberty to apply to the Court of Chancery for payment into court of the sum of 2000*l.*, or any part thereof, in case the Appellants in such appeal

1837.

THE EAST INDIA
COMPANY.
v.
CAMPION.

1837.

THE EAST INDIA

COMPANY

v.

CAMPION.

should delay proceeding to such new trial. And it was further ordered, that the decree or order of the Court on further directions of the 15th of February, 1832, should be reversed. In pursuance of the order of the House of Lords, the Respondent, John Campion, and the other Respondents, proceeded to a new trial of the issue, and upon the trial thereof a verdict was again found in favour of the Respondent, John Campion, the Plaintiff at law, subject to the opinion of the Court of Common Pleas upon a special case, upon the argument of which, the Court pronounced its opinion and judgment thereon in favour of the Respondent, John Campion.

All the proceedings subsequent to the decree on the original hearing of the cause, including the trials at law, were respectively taken and had in the absence, and without the privity of the Appellants, who had no notice thereof.

The Respondent, John Campion, having obtained the order of the 13th of June, 1836, for setting down the cause to be heard on further directions, served the same on the clerk in court of the Appellants, and the cause came on to be heard before the Vice-Chancellor, upon the verdict and on further directions, on the 6th and 23d days of July, 1836; and it was thereupon, by a decretal order dated the 23d of July, 1836, referred to the Master to take an account of what was due to the Respondent, John Campion, under the charter-party, and to compute interest thereon, at the rate of 5*l.* per cent. per annum, from the 1st of September, 1818, being the time when the bills of exchange in the pleadings mentioned agreed to be given would have been due; and after giving cer-

tain directions for the taking of such account, it was among other things declared, that in case any balance should be found due to the Respondent, John Campion, on the said account, he had a lien for the amount thereof on the sum of 2000*l.* in the pleadings mentioned ; and it was ordered that the Appellants should pay into the Bank, with the privity of the Accountant-General of the Court, to be there placed to the credit of this cause, subject to the further order of the Court, the sum of 2000*l.*, but the same was to be without prejudice to any question of interest or lien on the interest of the said sum of 2000*l.*, and the Respondent, John Campion, was to be at liberty to apply to the Court respecting the interest of the said sum of 2000*l.* as he might be advised.

1837.

 THE EAST INDIA
 COMPANY
v.
 CAMPION.

This order was, on the 20th of September, 1836, enrolled in the Court of Chancery, by or at the instance of the Respondent, John Campion.

The appeal was against this order.

For the Appellants, the *Solicitor-General* and *Sir Charles Wetherell*.

The suit being a mere suit of interpleader, limited to the sum of 2585*l.* 0*s.* 10*d.*, and the Appellants having been in effect dismissed by virtue of the original decree, it was irregular, and at variance with the universal practice of the Court observed in suits of this description, to give any directions relative to the sum of 2000*l.*, which formed no part of the subject of interpleader, or to give any relief as against the Appellants, by a decree made on the hearing for further directions.

Even if consistently with regularity of proceeding and the practice of the Court, it was competent to

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

the Court to give any relief touching the sum of 2000*l.*, that relief ought to have been given against the Respondents, Richard Campbell Bazett and his partners, who by their answer admitted that they had received that sum from the Appellants.

The decree on further directions was expressed to be made, and was in fact made, on the footing of a verdict given upon the trial of an issue of fact, between the Respondent, John Campion, and the other Respondents. The declaration and order complained of by the Appellants are respectively founded upon this verdict; and by this means the Appellants are held, contrary to the first principles of justice, to be affected and bound by the result of proceedings taken in their absence, and to which they are perfect strangers.

Even supposing that in this suit, being a mere suit of interpleader limited to the sum of 2585*l.* 0*s.* 10*d.*, any question relative to the sum of 2000*l.* could be properly raised, yet the right of the Respondent, John Campion, to have the sum of 2000*l.* considered and dealt with, as is done by the present decree, as a sum still remaining in the hands of the Appellants, involves the question, whether he did or not, in fact, consent to the payment thereof to the other Respondents in the year 1818. But this question did not form an issue in the cause. The fact of consent has not been, nor could be either proved or disproved therein; and this is a question which, even upon the assumption that the payment was made without his consent, the Respondent, John Campion, ought now to be precluded from raising, after having suffered so long a period to elapse, without taking any effective steps, by cross-bill or otherwise, with a view to

obtain any relief against the Appellants in respect thereof.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

It appears by the answer of the Respondent, John Campion, that he did not claim even the whole of the sum of 2585*l.* 0*s.* 10*d.*, which was the subject of interpleader, and was paid into court by the Appellants, and that this sum was more than sufficient to satisfy what he stated to be then due to him for principal money, together with interest thereon; and although the delay which has taken place in settling the disputes of the parties, and in establishing the right of the Respondent, John Campion, may have swelled the amount of his claim beyond the sum so paid in, yet that delay is not imputable to the Appellants, and the consequences of it ought not to be visited upon them.

The principle upon which the decretal order complained of was founded, being that the Respondent, John Campion, having ultimately established his right, the injunction obtained against him was wrongfully obtained, is a principle which strikes at the root of all bills of interpleader. The mere fact that there were adverse claims on the fund in the hands of the Appellants, is not displaced by the subsequent success of one, and the defeat of the other of those claims. It was that fact which warranted the course of proceeding adopted by the Appellants, in filing the bill of interpleader and obtaining an injunction thereon. The character of that proceeding cannot be affected, nor can it afterwards become liable to be objected to as an improper course with respect to either of the adverse claimants, by the ultimate issue of the litigation between them.

The decree or decretal order complained of is

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

perfectly unprecedented, and not maintainable by any principle hitherto recognised in courts of equity in interpleading suits; and the injustice and hardship to which the Plaintiffs in this suit must be exposed, if the principle adopted by the Court below, in the present case, be sanctioned, shew the expediency and necessity of adhering to those established rules, which have hitherto strictly confined the proceedings in an interpleading suit to the subject of interpleader.

For the Respondents, Mr. *Knight* and Mr. *Wigram*.

The Respondent, John Campion, had a lien on the whole of the proceeds of the cotton-wool for the whole of the freight due to him (beyond the freight of the cotton-wool itself), and for interest upon such freight, and the Appellants having notice of such lien, were not justified in paying over any part of the proceeds to the firm of Bazett, Farquhar, Crawford, and Co., without the consent of the Respondent, John Campion; and the Appellants untruly stated in their bill of interpleader, that they had paid the 2000*l.* in question to the other Respondents, with the consent of the Respondent, John Campion; but the Appellants ought to have stated the case truly, and thereupon ought to have brought that sum into court in the first instance.

The right of the Respondent, Campion, has been established by verdict and judgment at law, and he has suffered loss by acts of the Appellants, for which he might have had a remedy at law, and which ought now to be supplied in equity; *Pul-teney v. Warren**, *Browne v. Newall*.†

* 3 Ves. 73.

† 2 My. & C. 558.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

The *Lord Chancellor*. — In this case the appeal is on behalf of the East India Company, against an order of his Honour the Vice-Chancellor, by which it is ordered that the Plaintiffs in the interpleading suit should pay into the Bank of England, with the privity of the Accountant-General of this Court, the sum of 2000*l*. But this is to be without prejudice to any question of interest or lien on the said sum of 2000*l*., and the Defendant, John Campion, is to be at liberty to apply to the Court respecting the interest of the said sum of 2000*l*. as he may be advised; and any of the parties are to be at liberty to apply to the Court.

The question arises upon a legitimate subject-matter of a suit of interpleader, the East India Company having, in the execution of a duty imposed upon them by act of parliament, received the proceeds of certain goods. The question appears to be, whether Bazett and Company, who were the consignees, were entitled to receive the money, or whether Mr. Campion, by virtue of a charter-party, was not entitled to a lien upon the proceeds of these goods, to satisfy the amount due for freight.

It appears that part of the proceeds of the goods had been paid to Mr. Campion. It appears that the other part, being a sum of 2000*l*., had been paid to Bazett and Company, whether with the consent of Mr. Campion or without it, depends upon proof of the allegation in the bill, by which it is alleged to have been paid with his consent; and there is an answer of Mr. Campion, not disputing the fact of its having been so paid, but disputing the statement in the bill, of its having been paid with his consent. But that there

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

was a sum of 2000*l.*, part of the proceeds of the goods, which did not remain in the hands of the East India Company, is a fact with respect to which neither party raise any dispute.

Under these circumstances, the East India Company having parted with so much of the proceeds, and having in their hands the sum of 2585*l.*, the balance of money received by them on account of the proceeds of the goods, the contest arises, whether that sum is payable to Messrs. Bazett and Company, the consignees, or whether Mr. Champion has not a lien upon that sum, for the amount which he claimed to be due to him for freight.

Now it appears from his answer, that what he claimed for freight at the time when he put the answer in was the sum of 1746*l.* 13*s.* 8*d.*, together with interest thereon from the time the balance became due. The balance became due, it appears, in the year 1818; he, therefore, was entitled, according to his own statement, to 1746*l.*, together with interest upon that sum from the year 1818; the answer having been put in in the year 1824. Now giving the utmost possible allowance for what would become due as interest in that interval, it is impossible that it should amount to the sum of 2585*l.* He stated only that he claimed to be entitled to the greatest part of the sum so remaining in the hands of the East India Company; and at the time when the East India Company held the stake which was the subject-matter of the contest, Bazett and Company made an objection to Mr. Champion's lien. Under these circumstances, the East India Company finding themselves attacked by both parties, not knowing to whom they ought to pay it, exercised the right

which any person under those circumstances is entitled to, of coming into a court of equity and stating, that money or other property which he holds being in contest, he is ready to make it over to the party who proves that he is entitled to it; but that he is unable to discover who is entitled to it, and therefore he calls upon the Court to exercise its jurisdiction to take from him that which he admits is not his own, to decide between the contending parties, and to ascertain to whom it ought to be transferred. The money accordingly was, in this case, paid into court, and an injunction granted.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

Unfortunately many years litigation have ensued between the two contending parties before they have been able to settle to which of the two claimants the money was due. In the meantime the East India Company had, on the day specified in the order, paid the money in, and relieved themselves from the whole of the demand made upon them; they not being able to ascertain to whom it was due.

If the principle were ever to be established, which this decree would go to establish, that a party from whom money is claimed by different persons, cannot relieve himself from the obligation by paying the money into court in an interpleading suit, the result would be inevitable, that a party so circumstanced would lose all benefit from an interpleading suit; and, in such a case as this, it is obvious that the debtor had better pay both of the claimants than apply to the Court for its protection, although it is not likely that another instance might occur, in which the litigation would be such as to make the final amount to be paid

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

more than equal to the double of the original demand.

Now whose fault is this? Is it the fault of the East India Company, that the successful party has suffered by the delay which has arisen from this litigation? The party bound by the obligation is not the cause of it. He was ready to pay the claimant proving that he was entitled to the matter in dispute. The evil has arisen not from any fault of the East India Company, but from the protracted litigation of the party who ultimately turned out to have no right. No case has been cited at the bar. No case has been referred to in which any such claim as this has been made, as against a party who in an interpleading suit had deposited the subject-matter of the contention in court, and had good reason to suppose, that by so doing, he had relieved himself of the obligation. I am satisfied that no case can be cited, because it appears to me inconsistent with the first principles of interpleader, and goes to nullify the objects which courts of equity profess to have in exercising this jurisdiction, and so it has been treated throughout this cause; because, wherever we find an order upon any party to make good an ultimate loss, it is nowhere made against the East India Company; but it is always made against the party who has been the cause of the litigation and the loss. Accordingly it appears, that the order of the 15th of February, 1832, (which was afterwards reversed, not on account of this provision, but because this House thought there ought to be further enquiry at law) directed the Master “to take an account, “and that the deficiency should be paid by the “other Respondents, out of the sum of 2,000*l*.

“ received by them out of the proceeds of the sale
 “ of the cotton-wool,” another instance shewing
 that the 2,000*l.* had passed from the possession of
 the East India Company, and was admitted to
 have been received by the firm of Bazett and
 Company.

1837.

THE EAST INDIA
 COMPANY
 v.
 CAMPION.

Upon this money being paid into court, Mr. Campion applied to have it laid out, and the matter in contest (which constitutes the loss which Mr. Campion, if he has not a remedy elsewhere, will ultimately sustain) is the difference between the interest of 5 per cent., to which he was entitled under this charter-party, and that interest which the sum paid into court and invested in the 3 per cents., will produce. The order of the 15th of February, 1832, directed that the stock which had been purchased should be sold, and in case it should be insufficient to pay the amount found due, that the whole of the money arising from the sale and the cash, should be paid to Campion. And then it directed, that he should give security, it being then unascertained what would be the amount of his ultimate demand, to refund the same in case the Court should thereafter so direct. And it was ordered, that Messrs. Bazett and Company should give security, to be settled and certified by the Master, to pay the sum of 1154*l.* 7*s.* 4*d.*, being the residue of the money by the decree ordered to be paid by them to Campion, together with the subsequent interest and costs, in case the decree should be affirmed; and the other Respondents should be ultimately ordered to pay the same or any part thereof. It was unascertained what at that time would be exactly the amount of Mr. Campion's claim; he was to receive the money out of the

1837.

 THE EAST INDIA
 COMPANY
 v.
 CAMPION.

Court, he giving security to refund. On the other hand, it having been ascertained, that 1154*l.* would be due to him, Bazett and Company were to give security to pay that sum of 1154*l.* on settling the account, together with the amount of interest and costs which might be found to be due to Campion. I use this only to shew, that from the commencement of the cause down to the present time, the Court of Chancery has considered that the East India Company were entirely discharged from obligation, by paying the money into court. And the order of the 25th of April, 1832, provides means by which Campion, in the event of his succeeding in establishing a claim beyond the money paid into court, should from Bazett and Company receive not only the amount due at that time from them, but the amount of the subsequent interest and costs.

When those orders came before this House, an order was pronounced directing the course to be adopted for further investigating the title of the parties at law; and that order contains this provision: it was ordered, that Mr. Campion should have liberty to apply to the Court of Chancery for payment into court of the sum of 2000*l.* in case the other Respondents should delay proceeding to a new trial. It is quite clear, that the object of that provision was to secure to Mr. Campion the means of a speedy termination of the question between himself and Bazett and Company. It is also quite clear, that that order was addressed to Bazett and Company; and it is an additional confirmation of the course which the Court adopted of looking to Bazett and Company, as the parties who

were bound to pay whatever Mr. Campion was entitled to claim.

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

The result of the former litigation has been to establish the right of Mr. Campion, and undoubtedly, it would be most unfortunate if Mr. Campion, who has been for so many years kept out of his just rights by the claim set up, and the litigation following that claim on the part of Bazett and Company, should not be indemnified. But it would be equally unfortunate, if an innocent party should be required to make good these losses; if the East India Company, who have been driven by circumstances, over which they had no controul, to the course which they adopted, and who have paid the money to Bazett and Company in the manner which I have stated, should now be called upon to pay it over again; that money being in the hands of Messrs. Bazett and Company, and of course available for all those purposes for which Mr. Campion would be entitled to make use of it, for the purpose of reimbursing him for the loss which he has sustained.

The order of the Vice-Chancellor after the last trial, founded upon the final establishment of Mr. Campion's rights, directs an account to be taken: following, I believe, the terms of the order of the Master of the Rolls, it directs an inquiry to be carried on for the purpose of ascertaining what is now due to Mr. Campion, and then it declares that Mr. Campion has a lien for the amount thereof on the sum of 2000*l*. As far therefore as any declaration of right can establish the title of a party, this decree does establish Mr. Campion's title, because it declares that he has a lien upon that sum. Who then is in possession of that sum upon which it is

1837.

 THE EAST INDIA
 COMPANY
 v.
 CAMPION.

declared he has a lien? All the proceedings admit that this sum of 2000*l.*, upon which it is declared that he has a lien, is in the hands of Bazett and Company, — not in the hands of the East India Company. I apprehend, therefore, that although we had not the advantage of hearing the case argued on the part of Messrs. Bazett, that they are substantially parties at your Lordships' bar; and I apprehend that the order, so far as I have now stated it, declares, as against Bazett and Company, that Mr. Campion is the party having a lien upon the fund admitted and proved to be in the hands of Bazett and Company.

But the contest here is not between Bazett and Company and Mr. Campion, but it is between Mr. Campion and the East India Company; and although the declaration of lien is included in the appeal, it does not appear at all necessary for the purpose of relieving the East India Company from that part of the decree, which imposes so great a burthen upon them, to alter the other part of the decree. The part of the decree which affects them is, that which orders them to pay the 2000*l.* into court. If your Lordships are of opinion that the decree ought to be altered by omitting that portion of it directing the East India Company to pay 2000*l.*, it leaves the right to Mr. Campion not only untouched, as between him and Bazett and Company, but it leaves standing on the face of that decree a declaration which would be found quite sufficient to enable him to get that relief to which he is entitled.

The case of *Pulteney v. Warren*, which was urged at the bar on behalf of the Respondent, and which I had occasion lately to consider, together with

several others, established only this principle, that where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances and for a length of time which deprives his adversary of his legal rights, the court of equity considers that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party, so prosecuting an unfounded claim, has deprived his adversary. It was upon that principle that Lord Eldon made the order in *Pulteney v. Warren*, because there a party had, by litigation, improperly deprived his opponent of his legal remedy. It is for such reason that a court of equity will give a party interest out of the penalty of a bond, where, by unfounded litigation, the obligor has prevented the obligee from prosecuting his claim at the time when his legal remedy was available. Upon that principle it is that when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the Court will, in some cases, give interest upon the annuity. All those cases * depend upon the same principle of equity; a principle which cannot properly be applied to a case of a totally different nature, and one in which the circumstances do not seem to me to justify that which has been done in this case, namely, that an adverse order should be pronounced after the suit has been for many years considered an interpleading suit, upon the application of one of the Defendants, directing the Plaintiff in the suit to pay a sum of money into court, which never was a subject of interpleader, and as to which the Plaintiff in the interpleading suit never asked for any relief.

* See the note at the end of the case.

1837.



THE EAST INDIA
COMPANY
v.
CAMPION.

1837.

 THE EAST INDIA
 COMPANY
 v.
 CAMPION.

Those cases, therefore, although they establish a perfectly good principle in themselves, are no authority for the order against which this appeal is made. I submit, therefore, to your Lordships, that the order of this House should be so far to vary the order of the 23d of July, as to omit that portion of it which directs the East India Company to pay the money into court.

Lord Brougham. — There can be no doubt that the decree of the Court below must be so far varied. It is possible some mistake may have arisen in the Court below with respect to the order made by your Lordships' house in 1834, when the decree refusing a new trial was reversed, and your Lordships directed that a new trial should be had of the issue. The result of the new trial was that the same party prevailed upon the second trial as upon the first, namely, Mr. Campion ; and I cannot help stating, that in consequence of all this litigation in the Court below and here, Mr. Campion is subjected to very great delay and to very heavy costs. Considerable difficulty appears to have occurred in discharging that part of the order of the House to which I am about to advert, though I confess I should not have thought there was any thing of obscurity which could have given an opportunity of construing it otherwise than in the mode which will be consistent with your Lordships' present decision. After directing the variation of the decree below as regarded the refusing of the new trial, your Lordships directed the new trial to be had, and then added, " And it was further
 " ordered that the Respondent, John Campion,
 " should have liberty to apply to the Court of

“Chancery for payment into court of the said sum of 2000*l.*, or any part thereof, in case the said Appellants in such appeal should delay proceeding to such new trial.” It is quite clear that this could not mean to affect the East India Company, which was no party to the appeal before this House. It appears to be clear, from the very words of the order, that the party against whom the application of it was intended to be directed, and was by the terms of the order directed, was not the East India Company, but Campbell, Bazett, and Company. The liberty was for application to be made, in case the said Appellants in the appeal should delay proceeding to such new trial. Now who were the Appellants? Campbell, Bazett, and Company; and this plainly indicates, therefore, the purpose of the order, to prevent any unnecessary delay in bringing on that issue to a trial. The parties appellant, Campbell, Bazett, and Company, having resisted the new trial, it was apprehended might be slow in bringing it on, and that Mr. Campion might thereby be exposed to still further hardship in obtaining his rights; therefore it is said he shall be at liberty to apply to the Court for a payment into court. The purpose was to insure expedition, if the Appellants should be found dilatory in bringing forward the trial, which the reversal of the order of the Court below had directed. With respect to the costs of this appeal, Mr. Campion cannot, of course, have them from the East India Company. The East India Company have been put to an expence to which they ought not to have been subjected, in coming here to have the order altered in their favour, but he is subject to the costs. How then will your Lordships deal with these costs?

1837.

THE EAST INDIA
COMPANY
v.
CAMPION.

1837.

THE EAST INDIA
COMPANY.
vs
CAMPION.

The question is, whether there are not the means of giving those costs against Campbell, Bazett, and Company? They are not, in point of fact, before the House, but it is only by their own default that they are not so ; they might be here, but they do not choose to appear. It is a question whether it is not possible so to frame this order as to prevent the costs of this appeal falling on Mr. Campion, upon whom or upon the East India Company they must necessarily fall in the first instance. As to the Appellants who have prevailed in the appeal, it is quite clear they cannot be given against them, and it is equally clear that Mr. Campion ought not to be subjected to them.

Judgment reversed.

See *Anon.* 2 Ca. in Chancery, 217.; *Pulteney v. Warren*, 6 Ves. 73.; *Morgan v. Morgan and Jones*, 2 Dick. 643.; *Grant v. Grant*, 3 Sim. 340., see p. 364.; 3 Russ. 598., see p. 607. *et seq.*; *Duval v. Terrey*, Shower's Parl. Cases, p. 15.; *O'Donel v. Browne*, 1 Ba. & Be. 262.

1837.

MORTIMER

v.

TREZEVAULT.

ENGLAND.

(COURT OF CHANCERY.)

ANN MORTIMER, - - *Appellant*;

PETER TREZEVAULT and ELIZA-	} <i>Respondents.</i>
BETH WILLOUGHY his Wife,	
and Others, - - -	

In a suit for an account of the outstanding estate of an intestate, and upon a decree of reference to the Master, to inquire what part of the estate was outstanding, and a charge carried in by the Plaintiffs, it was found by the report that there was due from G. M. 20,000*l.*, lent by the intestate in April, 1826, 18,000*l.*, with interest, under a contract for purchase of part of the real estate of the intestate, 47*l.* for furniture, and 37*l.* for rent received on account of the intestate. A further charge was carried in against G. M. of 6000*l.* and 4000*l.*, the amount of two drafts drawn by G. M. upon the bankers of the intestate, 4504*l.* 6*s.* 11*d.*, the price of some wool, 1750*l.*, the price of some sheep, 266*l.* by a check, and 664*l.* 11*s.* 9*d.* in cash, received by G. M., for rent due to the intestate, 1000*l.*, value of furniture, the value of a marble statue, and certain timber. With respect to part of these sums and articles, they were claimed by G. M., as gifts from the intestate, under the following circumstances:—

In 1821, F., the intestate, gave the following authority to his bankers: “To Messrs. Barnett, Hoare, and Co., London, “2d October, 1821. Gentlemen, I request you will please “to advance to G. M. such sums of money as you may think “prudent, with the opinion of Mr. D. C., for the purpose of “assisting him to pay in ready money the wool with which “he manufactures his cloth. (Signed) J. F.” In pursuance of this authority, G. M. drew on the bankers for the before mentioned sums of 6000*l.* and 4000*l.* In October, 1822, J. F. delivered to his bankers the following order:— “Messrs. B. & Co. Please to honour such cheques as Mr. “G. M. may draw for my use.” In pursuance of this order G. M. drew on the bankers cheques, which were duly ho-

1837.

—
MORTIMER
v.
TREKAVANT.

noured, to the amount of 20,000*l.* In January, 1826, G. M. purchased from the intestate part of his estate, at the price of 19,700*l.*, of which 675*l.* was paid by way of interest upon the purchase money, to the administrator of the intestate. What remained due was matter of dispute as to the amount, but it was admitted by G. M. that 18,000*l.* was due. In April, 1826, the intestate advanced to G. M., by way of loan, the sum of 20,000*l.* through the medium of the mercantile house in which the intestate was a co-partner. G. M. was also supplied with wool to the amount of 7000*l.* by a tenant, and under the authority of the intestate, to whom the tenant was indebted to the same amount for rent. G. M. was also supplied by the partners of the intestate, and debited in their partnership accounts, with indigo to the amount of 2373*l.* 13*s.* 3*d.*; and he was also charged in the proceedings before the Master upon the reference, with the possession of various articles of furniture to the value and amount of 18,865*l.* 11*s.* As to the sum of 18,000*l.*, part of the sum of 19,700*l.*, it was admitted by G. M. that it was due from him to the estate of the intestate; and upon a question made as to the validity of an alleged will of the intestate, a declaration was made by G. M. in an affidavit, that one of the sums of 20,000*l.* advanced to him by the intestate was a loan and not a gift, but this declaration he retracted, as obtained from him by stratagem. As to all the sums and articles of property forming the subject of charge, except as before stated, G. M., by his examination and answer put in to interrogatories, claimed them as gifts to him from the intestate; and, in support of this claim, produced three letters or documents purporting to be signed by, but the body of the documents not being in the hand-writing of the intestate, his uncle, in the following words and figures:—“ Church House,
“ April 30th, 1826. Dear George, — To relieve your anxiety
“ about matters concerning money, I tell you that all sums
“ of money you have ever received from me are gifts, and
“ not loans. This I think ought to satisfy your lady, and
“ convince her that I am doing a great deal for the benefit
“ of your family, as I have always told her. (Signed) J. F.”
As to the transaction respecting the wool, and sheep, and indigo, G. M. produced a letter, which as he alleged was signed and delivered to him on the 20th of December, 1825, as follows:—“ Fonthill Abbey, September 20th, 1825.
“ Dear George, I agree to give you all the Merino wool and
“ sheep which B. has given for payment of his rent, to be
“ manufactured at the mill for your use and benefit; likewise

“ indigo, for which I will give you an order upon the house
 “ in Broad-street; and on my arrival in town, I will make
 “ arrangements to give you a sufficient capital to carry on
 “ the mill to its extent, and it is my wish that the machinery
 “ should be upon the latest improvements. (Signed) J. F.”

As to the plate, furniture, and fixtures, G. M. produced a letter, which as he alleged was signed and delivered to him on the 5th of December, 1825, as follows:— “ Dear Sir, The
 “ plate, furniture, and fixtures, or any of the materials, or
 “ glass you may require from the Abbey, to complete your
 “ new house, or any description of timber on the Fonthill
 “ estate, you are to take away before the remainder of the
 “ property is valued. (Signed) J. F.”

Held, under these circumstances and upon this evidence, that the advances of money were loans and not gifts; but upon some of the questions the Master was directed to make further inquiries.

ON the 10th of February, 1829, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, together with the Respondent Charles Robert Simpson, and Henry Arthur Broughton (who is since deceased), the then trustees of the property to which the Respondent Peter Trezevant and Elizabeth Willoughby his wife were entitled, in respect of the Respondent Elizabeth Willoughby Trezevant being one of the next of kin of Mr. Farquhar, filed their bill in the high Court of Chancery, against the Respondent John Farquhar Fraser, and James Mortimer, George Mortimer, the Respondents Sir William Templer Pole and Dame Charlotte his wife, James Lumsden and Mary his wife, and William Aitkin and Charlotte his wife, thereby, amongst other things, stating that John Farquhar was, at the time of his decease, seised to him and his heirs of very considerable freehold and copyhold estates, which he had contracted to sell, and that he was possessed

1837.

MORTIMER
 v.
 TREZEVANT.

1837.

MORTIMER,
v.
TREZEVANT.

of very considerable personal estate, and that he died on the 6th of July, 1826, intestate, leaving the Respondent Elizabeth Willoughby Trezevant his heir at law and customary heir, and also leaving the Respondent Elizabeth Willoughby Trezevant, together with the Respondent James Mortimer, and the said George Mortimer, the Respondent Mary the wife of the Respondent James Lumsden, the Respondent Charlotte the wife of the Respondent William Aitken, the Respondents John Farquhar Fraser, and Charlotte the wife of the Respondent Sir William Templer Pole, bart., his (the intestate's) only next of kin him surviving. And also stating a settlement, whereby the Respondent Charles Robert Simpson, and the said Henry Arthur Broughton, were appointed trustees for the Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their children, of one seventh share of the personal estate and effects of the said John Farquhar, and of the monies to arise from the sale of his freehold and copyhold estates; and also stating, that on the 15th of December, 1826, the Respondent John Farquhar-Fraser obtained letters of administration of the said intestate's personal estate, and that he had possessed himself of the personal estate of the said intestate; and thereby praying that an account might be taken of the personal estate and effects of the said intestate possessed by or come to the hands of the Respondent John Farquhar Fraser, and that an account might also be taken of the debts and funeral expenses of the said intestate; and that his said personal estate might be applied in a due course of administration, and that the clear residue thereof might be ascertained, and

that one seventh part or share of the clear residue thereof might be paid by the said Respondent John Farquhar Frazer, to the Respondent Charles Robert Simpson, and the said Henry Arthur Broughton, as such trustees as aforesaid, upon the trusts of the said indenture.

The several Defendants to the bill put in their answers thereto.

Part 2. of schedule A., to the answer of the Respondent John Farquhar Fraser, was entitled as follows, and contained, amongst others, the items following, (that is to say) “Containing an account of all such parts of the personal estate and effects of the intestate as are still remaining out-standing or undisposed of.”

Amount due from the Defendant, George Mortimer, one of the next of kin, for money lent to him by the deceased, in October, 1821 10,000*l*.

Ditto, from ditto, ditto, April, 1826 20,000*l*.

Against which this Defendant has retained the sum of 21,337*l*. 15*s*. 5*d*., the amount of what was distributed in stock amongst the other next of kin, in the month of - -

The value of a quantity of indigo delivered to the said George Mortimer, by Messrs. Bazett, Farquhar, and Company, and charged to the account of the intestate - - 2373*l*. 13*s*. 5*d*.

The value of a quantity of wool, delivered to the said George Mortimer, by John Benett, esq., to be accounted for by the said George Mortimer to the intestate - - -

The value of a quantity of linen, china, and curiosities, and certain articles of furniture, belonging to the intestate, in the possession of the said George Mortimer - - -

1837.

MORTIMER

v.

TREEVANT.

1837.

MORTIMER

vs
TRESVANT.

A marble statue of the late Mr. Beckford, in the possession of the said George Mortimer -

The value of a small quantity of furniture, taken at a valuation by the said George Mortimer

The cause was heard before the Master of the Rolls, on the 30th of March, 1830, when he decreed an account of the personal estate of John Farquhar, the intestate, come to the hands of the Respondent John Farquhar Fraser, the administrator: And an account of the intestate's debts and funeral expenses, and interest on such of his debts as carried interest, with the usual directions in such cases for ascertaining such debts; and the decree also directed that the Master should take an account of the personal estate and effects of the intestate then outstanding: And that he should inquire whether it would be for the interest of the parties beneficially interested, that any proceedings should be commenced for the purpose of getting in the property outstanding, and whether any of the contracts of the intestate, for sale of his real estates, were then subsisting and capable of being, or ought to be carried into effect; and also whether it would be expedient that any of the leasehold property of the intestate, not contracted to be sold, or the contracts for which were not then subsisting, or not capable of being or ought not to be carried into effect, should be sold and disposed of: And it was ordered that the personal estate of the intestate should be applied in the first place in payment of his debts and funeral expenses: And it was ordered that the Master should enquire who was or were the next of kin of the intestate living at his death, and if any or either of them were since dead, and if dead, when they died, and who was or

were their personal representative or representatives; and the decree contained the usual directions for the better taking the said accounts and discovery of the matters aforesaid.

Various orders were subsequently made in the cause, with respect to the real and leasehold estates of the intestate, and relating to the sale thereof.

On the 21st of December, 1830, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, carried in before the Master a state of facts and charge, to the following effect:

That for several years previous to the decease of the intestate, the Defendant George Mortimer carried on the business of a wool-broker, merchant, and clothier, in London, and having represented to the intestate that he should derive much greater benefit than he then derived from his business, if he was enabled to pay ready money for his purchases, which he was then unable to do for want of the requisite capital, the Defendant prevailed on the intestate to give him an authority addressed to his (the intestate's) bankers, for the advance of such sums of money as he would require for the purpose aforesaid, out of his (the intestate's) monies from time to time in their hands, which was in the words and figures following, (that is to say) "To Messrs. "Barnetts, Hoare, and Co., London, 2d of October, 1821. Gent", I request you will please "to advance Mr. George Mortimer such sums of "money as you may think prudent, with the opinion "of Mr. David Colvin, for the purpose of assisting "him to pay in ready money the wool with which "he manufactures his cloth. I am, Gent", your "most obedient servant, John Farquhar." And at

1837.

MORTIMER
v.
TREZEVANT.

1837.

MORTIMER
v.
TREZZVANT.

the same time the Defendant offered and undertook to pay the intestate 5*l.* per cent. per annum upon each of such advances from the time they should be respectively advanced. That in pursuance of the said authority, the Defendant in the lifetime of the intestate drew various drafts on the said bankers, for various large sums or money, and amongst the rest of the said drafts he drew one on the 15th of October, 1821, for 6,000*l.*, and another on the 9th of November, 1821, for 4,000*l.* That none of the said drafts were ever repaid to the intestate in his lifetime, or to the administrator since his decease, but the same and all interest, according to the undertaking of the Defendant, remained then due from the Defendant to the estate of the intestate.

That in October, 1822, the intestate contracted with William Beckford, of Fonthill Abbey, esquire, for the purchase of certain large real estates at Fonthill, and other parishes, and places adjoining, together with a great quantity of household furniture, plate, china, books, pictures, curiosities, and other valuable personal property and effects, in Fonthill Abbey aforesaid, and was soon after his said purchase induced by the persuasions of the said Defendant, to build a factory on part of the said estate at his (the intestate's) expense, but under the superintendence and direction and for the use of the Defendant, the said Defendant undertaking to pay the said intestate interest at the rate of 5*l.* per cent. per annum upon such sums as should be advanced; and in order therefore to provide for the expenses of the said building, the said intestate wrote and delivered to his said bankers the following order: "Messrs. "Barnetts, Hoare, and Co. Gentⁿ., please to honour

“such cheques as Mr. George Mortimer may draw
“for my use. I am, gentⁿ., your most obed^t serv^t.
“J. Farquhar. Fonthill, the 28th of August, 1824.”

That in pursuance of the last-mentioned order, the Defendant in the lifetime of the intestate, drew a great many cheques on the bankers, exceeding altogether in amount the sum of 20,000*l.*, all of which were duly honoured by the said bankers out of the monies of the said intestate then in their hands.

That the said intestate entered into an agreement bearing date the 2d of January, 1826, whereby he agreed to sell to the said Defendant certain large freehold, copyhold, and leasehold estates, in the parishes of Fonthill Bishop, Fonthill Gifford, Tisbury and Chilmark, in the said county of Wilts, (part of the estates purchased by the intestate of Mr. Beckford), and including the factory hereinbefore mentioned, with the timber and other trees, on the freehold and copyhold parts thereof, at the price of 19,700*l.*, and which estates, or the greater part thereof, the said Defendant had recently contracted to sell for 40,000*l.* or some larger sum; and although it is expressed in the said agreement that the intestate in consideration of the sum of 1,700*l.* paid to him by the Defendant on the 5th of December then last past, in part payment of the said purchase-money, and of the remainder being secured on the said estates by way of mortgage, as thereafter also mentioned, yet the said Plaintiffs charge that in fact the sum of 1,700*l.* was never paid by the Defendant to the intestate, and that the intestate never gave to Defendant any receipt or acknowledgment for the same, other than what is expressed in the said agreement, which the said Plaintiffs submitted was not in law a sufficient

1837.

MORTIMER
v.
FARQUHAR.

proof of the payment of the said sum of 1,700*l.*, and the said Plaintiffs therefore charged, that the whole of the said 19,700*l.* is still remaining due thereon from the Defendant, together with interest thereon at the rate of 5*l.* per cent. per annum, from the 11th of October, 1826, according to the terms of the said agreement, except the sum of 675*l.* paid to the said administrator by the said Defendant on account of the said interest.

That the intestate on the 22d of April, 1826, through the medium of Messrs. Bazett, Colvin, and Company, with whom he was a partner, lent the Defendant the sum of 20,000*l.* at 5*l.* per cent. per annum, and the same, with interest at the rate aforesaid, was then due from the Defendant.

That John Benett, of Pythouse, in the county of Wilts, esquire, being indebted to the intestate in 7000*l.* for rent of various parts of the estate purchased by the intestate of William Beckford, esq., the Defendant prevailed upon the intestate to allow Mr. Benett to supply him with wool, for the purposes of his factory, to the amount of his said rent, to which the intestate and Mr. Benett consented, and Mr. Benett accordingly supplied the Defendant with wool to a large amount, and the Defendant undertook to account to the intestate for the same, and to pay him the value thereof, with interest at 5*l.* per cent. per annum.

That the intestate and his partners being in the year 1825 possessed of a large quantity of indigo, the Defendant in the month of November in the same year, induced the intestate to prevail on his said partners to consent to the same being delivered to him the Defendant, to be used in his said factory, the said Defendant undertaking at the same time

to pay the intestate the value thereof, with interest at 5l. per cent. per annum, and the said Defendant accordingly received a large quantity of the said indigo from the intestate and his partners, for which his partners have debited the intestate in the partnership accounts with the sum of 2,373l. 13s. 5d., and which the Plaintiffs presume was in fact the true and just value thereof, but the said Defendant never paid the sum of 2,373l. 13s. 5d., or any part thereof, to the intestate or to the said administrator since his decease.

That the Defendant in the lifetime of the intestate and also since his decease, without the consent of the intestate or the administrator since his decease, received various sums of money from the tenants of the intestate of his estates in Wiltshire and in Middlesex, but hath never come to any account for the same or paid any part thereof, either to the intestate or to the administrator since his decease, and there was then a large sum of money due from the Defendant in respect of the same.

That soon after the intestate purchased the estates, and the household furniture, plate, china, books, pictures, curiosities, and the other valuable personal property and effects of William Beckford, Mr. Phillips, of Bond Street, auctioneer, was put in possession of the same, and was employed by the intestate to make an inventory and appraisement thereof, with a view to a sale, and accordingly part thereof was sold by auction, and delivered to the respective purchasers, and when Mr. Phillips quit-
ted possession of the unsold parts thereof, he left the same, which the Plaintiffs believed amounted in value to the sum of 18,865l. 11s., with a marble statue of Alderman Beckford, the father of

1837.

MORTIMER

v.

TRESKANT.

1837.


MORTIMER
v.
TREZEVANT.

William Beckford, of very considerable value, at Fonthill Abbey : all of which were taken possession of by the Defendant, and appropriated to his own use.

That in addition to the before-mentioned properties, there was also due from the Defendant, to the estate of the intestate, the sum of 45*l.*, being the amount of a small quantity of furniture belonging to the intestate in Church House, taken by the said Defendant at a valuation.

The Plaintiffs Peter Trezevant and Elizabeth Willoughby, his wife, and their trustees, therefore charged that the Defendant ought to be examined upon interrogatories to be settled by the Master, touching the several matters aforesaid; and in case the Defendant should refuse to make a full disclosure and discovery of the said matters, then (no witnesses having been examined in the cause) that that the Plaintiffs might be at liberty to exhibit interrogatories for the examination of witnesses respecting the same, as they should be advised or might think fit.

On the 19th of February, 1831, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, exhibited interrogatories for the examination of George Mortimer, as such alleged debtor to the estate of the intestate, and on the 3d of May, 1831, George Mortimer put in his answer and examination thereto, and thereby in substance denied the allegations in the Respondents' state of facts, and that any of the sums of money therein stated to have been advanced by the intestate to him were advanced as loans at interest, and on the contrary stated, that the same were absolute gifts to him, and were always so considered by the

intestate in his lifetime, as well as all the other **p**roperty and effects, consisting of the wool and **s**heep, the indigo, and the household furniture and **e**ffects: and he further stated, that the intestate had **a**lways treated him in every respect as a parent, and **a**s such always expressed himself most anxious and **d**esirous to further his prospects in life, and to **p**rovide for him and his family: but George Mortimer by the examination admitted, that the sum of **18,000**l., the remainder of the purchase-money for **p**art of the Fonthill estate purchased by him as **b**efore mentioned, together with interest thereon, **a**t 5l. per cent. per annum, the sum of 37l. the **a**mount of rent received by him on account of the **i**ntestate, and the sum of 45l. for a small quantity of **f**urniture taken by him at a valuation, were then still **d**ue and owing from him to the estate of the intestate.

After George Mortimer had put in the above examination, and on the 29th of August, 1831, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, (as Plaintiffs in the suit,) carried in before the Master an amended state of facts, and thereby, after stating an agreement that had been entered into by George Mortimer with Mr. Benett, for the purchase of the before mentioned wool and sheep, it charged more explicitly the amount then due from George Mortimer in respect of the said wool and sheep.

On the 21st of June, 1832, the Respondents, Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, exhibited interrogatories for the examination of witnesses in support of their amended state of facts, and several witnesses were accordingly examined on the part of the said Respondents.

1837.

MORTIMER

v.

TREZEVANT.

1837.


MORTIMER
v.
TREZEVANT.

George Mortimer died on the 3d of December, 1832, having by his will appointed the Appellant and two other persons his executors, of whom the Appellant alone proved the will.

On the 21st of April, 1833, the Respondents, Peter Trezevant and Elizabeth Willoughby his wife, and the Respondent Charles Robert Simpson, together with the Respondent Robert Edwards Broughton, who had been appointed a trustee in the place of Henry Arthur Broughton, filed their bill of supplement and revivor against the Appellant, and against the Respondents John Farquhar Fraser, Sir William Templer Pole, Baronet, and Dame Charlotte his wife, the said James Lumsden and Mary his wife, William Aitken and Charlotte his wife, William Aitken, Lilas Aitken, and Charlotte Aitken, infants, the children of the said William Aitken, and against the Respondents William Buckland, William Henry Merle, James Mortimer, Lauchlan Aitken, James M'Hardy, and James Aitken, (the Respondents William Buckland, and William Henry Merle, being the trustees of a settlement made by the Respondents Sir William Templer Pole and Dame Charlotte his wife, of what they were entitled to, in consequence of the death of John Farquhar, the intestate,) and the Respondents James Mortimer, Lauchlan Aitken, James M'Hardy, and James Aitken, being the trustees of a settlement made by the Respondents William Aitken and Charlotte his wife, of the property or part of the property to which they were entitled in respect of the Respondent Charlotte Aitken, being one of the next of kin of the intestate: and thereby, amongst other things, stating the first mentioned suit and the proceedings had there-

under, and also stating that on the 3d of December, 1832, George Mortimer died, having made his will, dated the 2d of July, 1829, whereby he appointed the Appellant and Thomas Todd and Patrick Campbell executors of his will, and that the said Thomas Todd and Patrick Campbell had renounced probate of the said will, and that probate thereof had been granted to the Appellant, and also stating, that Henry Arthur Broughton had died, and that the Respondents Peter Trezevant and Elizabeth Willoughby his wife had appointed the Respondent Robert Edwards Broughton a trustee in his stead, and also stating an indenture by which the Respondents William Buckland and William Henry Merle were appointed trustees of the share of the fund belonging to the Respondents Sir William Templer Pole and Dame Charlotte his wife, for them, and also stating another indenture, dated the 15th of January, 1830, whereby the Respondent William Aitken assigned to the Respondents John Farquhar Fraser, James Mortimer, Lauchlan Aitken, and James M'Hardy, the sum of 25,000*l.*, part of the seventh share to which the Respondent Charlotte Aitken, or the Respondent William Aitken, in her right, became entitled in the residuary estate of the intestate, for the benefit of the Respondents Charlotte Aitken and William Aitken and their issue, and also stating that the Respondents William Aitken, Lilas Aitken, and Charlotte Aitken, were their children, and also stating another indenture dated the 14th of February, 1833, by which the Respondent William Aitken appointed the Respondent James Aitken to be such trustee instead of the Respondent John Farquhar Fraser ;

1837.

MORTIMER

v.

TREZEVANT.

1837.

MORTIMER
v.
TREZEVAULT.

bill prayed, that if necessary, an account might be taken of the personal estate and effects of the late Defendant George Mortimer, possessed by the Appellant, and that the Respondents, the Plaintiffs in the suit, might have the benefit of the said suit against the new Defendants.

The Appellant, and the Respondents, the Defendants to the suit appeared, and put in their answers to the last-mentioned bill, and the supplemental cause came on to be heard before the Master of the Rolls on the 12th of March, 1834, when a decree was pronounced by him, by which it was ordered that the decree of the 30th of March, 1830, should be prosecuted.


Afterwards the Appellant caused witnesses to be examined in support of the case of the late Defendant George Mortimer and of the Appellant.

The Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, appeared before the Master by their counsel, and supported their case, and the Respondent John Farquhar Fraser appeared as counsel for himself, and also supported before the Master the case of the last-named Respondents, and the Appellant appeared by her counsel before the Master, and supported her case, and the Respondents Sir William Templer Pole and Dame Charlotte his wife, and their trustees, and the Respondents William Aitken and Charlotte his wife, and the Respondents, their trustees and children, and the Respondents James Lumsden and Mary his wife, did not take any part in the proceedings before the Master upon the aforesaid inquiry,

The Master made his report and a schedule

thereto in the said causes, bearing date the 9th of February, 1835, by which he found that the outstanding personal estate of the intestate, then unreceived by the Respondent John Farquhar Fraser, consisted of the said sum of 20,000*l.*, which in or about the month of April, 1826, was advanced and lent by the intestate to the late Defendant George Mortimer, through the mercantile house of Bazett and Company, and that the sum of 18,000*l.*, being the residue of the sum of 19,700*l.*, the purchase money agreed to be paid by the late Defendant George Mortimer, for certain parts of the real estate of the said intestate, together with interest thereon, at 5*l.* per cent. per annum, from the 11th of October, 1826, and also the two several sums of 45*l.* and 37*l.* ; and that it did not appear to him that it was necessary at present to take any proceedings at law or in equity, other than the proceedings in that suit, for the purpose of getting in the said sums of money respectively.

The Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, and the Respondent John Farquhar Fraser, took exceptions to the report, in regard to that part of the decree made on the hearing of the original cause, whereby it was directed that the Master should take an account of the personal estate and effects of the intestate, then outstanding and unreceived by the Respondent John Farquhar Fraser ; by the first of the exceptions they insisted that the Master ought to have certified that the sum of 10,000*l.* was due from George Mortimer, by the second of the exceptions they insisted that the sum of 6254*l.* 6*s.* 11*d.* was due from the estate of the Defendant George Mortimer, by the third of the


1837.

 MORTIMER
 v.
 TREZEVANT.

1837.

MORTIMER
v.
TREZEVANT.

exceptions they insisted that the outstanding personal estate of the intestate unreceived consisted of a further sum of 266*l.* 1*s.* 4*d.*, received by George Mortimer, as agent of the intestate: by the fourth of the exceptions, they insisted that the outstanding personal estate of the intestate consisted of the further sum of 664*l.* 11*s.* 9*d.* paid by John Benett to George Mortimer, as agent to the intestate: by the fifth of the exceptions they insisted, that George Mortimer became accountable for the sum of 2375*l.* 13*s.* 5*d.*: by the sixth of the exceptions they insisted, that the outstanding personal estate of the intestate consisted of the further sum of 1000*l.*, the value of certain furniture and effects, the property of the intestate, which in or about the month of December, 1825, were taken possession of by the late Defendant George Mortimer, and appropriated to his own use: by the seventh of the exceptions they insisted, that the outstanding personal estate of the intestate further consisted of the value of seventeen oak trees, which as appeared were growing upon part of the Font-hill estate, the property of the intestate, and were cut and carried away by George Mortimer. The first and second of the exceptions of the Respondent John Farquhar Fraser corresponded with the Respondents the Plaintiff's first exception: the third and fourth of the exceptions corresponded with the Respondents the Plaintiff's second exception: the fifth of the exceptions corresponded with the third and fourth of the Respondents the Plaintiff's exceptions: the sixth of the exceptions corresponded with the fifth of the Respondents the Plaintiff's exceptions, and the seventh of the exceptions corresponded with the sixth of

the Respondents the Plaintiff's exceptions, except as to the sum charged, the Respondent John Farquhar Fraser, in his seventh exception, having insisted that George Mortimer's estate should be charged with the sum of 1500*l.* instead of 1000*l.*: by the eighth of the exceptions of the Respondent John Farquhar Fraser, he insisted, that the outstanding personal estate of the intestate consisted of a further sum of money and interest due from the estate of George Mortimer, in respect of the value of a marble statue of the late Alderman Beckford; and the ninth of his exceptions corresponded with the seventh of the Respondents the Plaintiff's exceptions.

1837.

 MORTIMER
 v.
 TREKERVANT

On the 11th of January, 1836, upon argument of the exceptions before the Master of the Rolls, his Honour held* the first, second, fifth, and sixth

* The judgment of the Master of the Rolls, which embodies and analyses the material parts of the evidence produced before the Master, is as follows: — 11th Jan. 1836.

The Master of the Rolls: — This case comes before me on several exceptions to the Master's report, taken by different parties; and I shall take them in the order in which they have been classed, and address myself, first, to the exception which raised the question as to the 10,000*l.*, which consists of two sums of 6000*l.* and 4000*l.* These are sums, which the party who opposes these exceptions, Mr. Mortimer, or those who now represent him, state to have been gifts from the intestate, Mr. Farquhar, to him; and this claim first rests on the authority of an order addressed by Mr. Farquhar to Messrs. Barnett, Hoare, and Company, the bankers of the intestate. The question is, whether the proposition contended for by Mr. Mortimer can be supported, namely, whether that evidence of gift is to be found in the document. The authority is in these words: — “I request you will be pleased to advance Mr. George Mortimer such sums of money as you may think prudent, with the opinion of Mr. David Colvin, for the purpose of assisting him to pay in ready money for the wool with which he manufactures his cloth.” Now the contents

1837.

MORTIMER

v.

TREZEVANT.

exceptions taken by the Respondents the Plaintiffs to the report, and the first, second, third, fourth,

of that document entirely negative the idea of gift at that time: whether the advance of money thereby directed was afterwards converted into gift is another question, which is hereafter to be considered; but as to the question arising out of this document, whether this was originally a gift or loan, it is to be observed, there is no limit in amount to the licence of borrowing. As a gift, it amounts to the whole fortune of the giver; but he refers it entirely (supposing it to be a gift) to the discretion of Mr. David Colvin, to what extent the gift should go. If he meant loan, it is very natural to suppose, that having plenty of money, it is very natural to suppose that he should wish to restrain the advances to what the situation and circumstances of the party borrowing might render expedient; and therefore he referred it to an individual in whose discretion he could trust, as to how far it would be safe to make the advances. It is hardly possible to contend on this document that this is evidence of gift, and not evidence of loan. Then it is said, that at a subsequent period, other documents from the intestate confirmed George Mortimer's representation of this being a gift; and particularly, the question having arisen between George Mortimer and James Mortimer, his brother, with whom he had been in partnership, in order to settle the partnership accounts, it was referred to arbitration, to ascertain whether the sums drawn by George Mortimer under this authority were to be carried to the account of the two, or whether they were to be carried to the account of the individual who claimed them as a gift; and that on that occasion Mr. Farquhar wrote a letter, which is in these terms: "The money advanced by me to Mr. George Mortimer, was entirely for the benefit of his own family, as far as regards the profits in trade." Now the question then being, not whether it was a loan or gift, but whether, as between the two brothers, the money was to be considered as the money of George, or the money of the two, Mr. Farquhar says, I advanced it entirely for the benefit of George; leaving it just as it was before, whether, as between Mr. Farquhar and Mr. George Mortimer, it was a gift or loan; for on that occasion the only question was, whether, as between the partners, it was to be considered as partnership stock, or as property belonging to one individual partner. Now it is not at all necessary to superadd observa-

sixth, and seventh exceptions taken by the Respondent John Farquhar Fraser to the report, to be

1837.

MORTIMER
v.
TREZZEVANT.

tions upon the obvious results of this document. The most extraordinary feature in the case, if this was an unlimited gift out of Mr. Farquhar's property, which was known to be so very extensive, is, that Mr. George Mortimer should have confined himself to only 10,000/. It is, however, stated, that although there is no limit whatever in the order, it was limited by other means to 20,000/., yet he takes only 10,000/. It is natural that a person borrowing money should limit himself to the sum which was required by his necessities; but upon the proposition that it was a gift, it is rather extraordinary that he should confine himself only to take 10,000/.

The question, as far as I have considered it, is upon the construction of documents about which there is no dispute; but the Defendants then produce some parol testimony;—there is the evidence of Mr. Hart Davis, and they rely on the conversation which Mr. Hart Davis states that he had with Mr. Farquhar, as affording evidence of the advance being a gift. The witness states a conversation, in which (speaking of the advance made by Mr. Farquhar to Mr. George Mortimer) Mr. Hart Davis expressed an opinion, that the advance, instead of doing good, would do harm to Mr. George Mortimer, if Mr. Farquhar was to withdraw it; on which Mr. Farquhar said, “he did not mean to withdraw the 10,000/.” Now the whole of that conversation proves that it was a loan. Did not Mr. Hart Davis consider that it was a loan when he asked that question? What could he have meant, by asking whether he meant to take that back, if it was a gift? If it was an advance of money, which of course he understood it to be when he asked the question, it was extremely natural for him to say, if you withdraw this loan you will do more harm than good; and Mr. Farquhar so assumes it, for he does not speak of it as he would have done if it was a gift; for he would in such case have said he had not the power to withdraw it, but he merely expresses an intention of not withdrawing it. It is not contended that that conversation could constitute it a gift; it was only used as evidence of what the prior transaction was. Then the other evidence produced on this subject is the evidence of Mr. Barnett, one of the bankers, and he says Mr. Farquhar gave Mr. George Mortimer an unlimited power to draw on their banking-house for his use. The terms of that order are,

1837.

MORTIMER
v.
TREZEVANT.

good and sufficient, except so far as the first and second exceptions of the Respondent John Farqu-

“ Please to pay such cheques as Mr. George Mortimer may “ draw for my use.” It is not a very uncommon thing for persons to trust others to draw for their use, but to suppose that that authority operated as a gift to the person to whom that power was delegated, or that it constituted evidence of some other transaction being a gift, is certainly an inference which it is impossible for me to draw from it. Then Mrs. Mary Mitchell is examined by Mr. Mortimer, and she deposes that Mr. Farquhar said he had given large sums of money to Mr. George Mortimer; but there is no date, no particulars, no specific sum referred to, and there is nothing which can connect that conversation with the particular sums in question.

Then papers were produced, which certainly are of a very extraordinary description; they are three in number, and the one which is produced, as applicable to this particular transaction, is dated the 30th of April, 1826: “ Dear George, to relieve your anxiety about matters concerning money, I tell “ you that all sums of money you have ever received from me “ are gifts, and not loans. This, I think, ought to satisfy your “ lady, and convince her I am doing a great deal for the benefit “ of your family, as I have always told her. I remain yours “ truly, J. Farquhar.” Now, I do not enter into the evidence, as to whether this document was signed by Mr. Farquhar or not; the body of it certainly was not written by Mr. Farquhar; the contest on the evidence is, whether it received Mr. Farquhar’s signature. I will assume that it did, and suppose, therefore, that although this document was not of Mr. Farquhar’s signature, composition, or dictation, but that Mr. Farquhar’s name appearing at the bottom of it, was, in point of fact, in his hand-writing. Now, whether this is to be taken as evidence of the advance having been originally a gift, or originally a loan, and afterwards made a gift by this instrument, the terms are not sufficiently distinct, exactly to know in what way it was intended to be put. It might be put in this way, — “ To relieve your anxiety about matters concerning money, I tell “ you that all sums of money you have ever received from me “ are gifts.” But the conclusive objection to this is, first, that there is no account given when this document was prepared, by whom it was written, or under what circumstances it was written. It was a document in the possession of Mr. George

Mr. Fraser sought to charge interest on the sums therein mentioned, and except so far as the seventh

1837.

MORTIMER

v.

TREZEVANT.

Mortimer, and it was not put forward till long after the question arose as to the sum of 20,000*l.*, which sum of 20,000*l.* being in discussion between the parties, was claimed originally by Mr. Mortimer, as a gift, and resisted by those who were interested in the estate, on the ground of its being only a loan; and Mr. Mortimer admits ultimately that 20,000*l.* to be a loan, and to be treated as a loan, and so deals with it in the Ecclesiastical Court. Now that 20,000*l.* was advanced on the 22d of April, 1826, and if Mr. Farquhar had any thing to do with writing, or dictating, or approving of the body of this letter, it must have been very fresh in his recollection on the 30th of April, 1826, when this letter bears date, and yet he is made to say that which Mr. Mortimer admits not to be true; for he must be considered as admitting the fact, when he gave up the 20,000*l.*, which otherwise he would be entitled to: he is supposed to sign a paper, which would undoubtedly cover that sum of 20,000*l.* as well as the 10,000*l.*, and every other sum advanced, although the 20,000*l.* is now admitted to be considered as a loan, and not as a gift. Looking at the state of the evidence under which Mr. Mortimer has thought proper to produce this document, I cannot pay the least attention to the name of Mr. Farquhar signed to it. He leaves the paper without any explanation of who wrote it, or under what circumstances it was written; and when I find this connected with other transactions, it is utterly impossible Mr. Farquhar could have so expressed himself on the 30th of April, on which day that document bears date. On this exception, I have no doubt that these sums of 6000*l.* and 4000*l.*, the sums drawn out under that authority which I have read, are to be considered as loans, and that they were loans from the beginning, and nothing has been brought forward in evidence before me to shew that they have ever ceased to deserve that character of loans up to the time of the intestate's death.

The next subject is the wool, amounting to 4504*l.*, and the sheep, at 750*l.*, making together 6254*l.* On the 10th of September, Mr. Benett, renting a large portion of the Fonthill estate, of which the rent was very large; the yearly sum payable for rent was about 3000*l.* Mr. Mortimer, managing for Mr. Farquhar, Mr. Benett at that time owing a year's rent, and Mr. Mortimer being authorized by Mr. Farquhar to receive

1837.

MORTIMER

v.

TREZEVANT.

exception of the Respondent John Farquhar Fraser stated the value of the household furniture, plate,

the rent from Mr. Benett, an agreement is made between Mr. Benett and Mr. Mortimer, by which the sum due from Mr. Benett was to be satisfied by Mr. Mortimer's purchasing wool of Mr. Benett, and that the money to become payable for the wool should be set off against the amount of rent due. There is a letter which is set out amongst these exhibits. "Memorandum, the 10th September, 1825. It was "agreed between George Mortimer, esquire, and John Benett, esquire, that the said George Mortimer shall purchase "all the said John Benett's wool, at the price of 2s. 4d. per "pound, for that which is washed on the sheep's backs." Then it goes on enumerating the sums. "And that the said John "Benett shall allow the said wool to be paid for by a deduction to the amount being made from his debt due on an acceptance, and to become due in rent to John Farquhar, "esquire, of Fonthill Abbey, with his consent, signified by his "signature hereto." And that which is signed by Mr. George Mortimer and Mr. Benett afterwards received the signature of Mr. Farquhar. It appears that this wool was ultimately delivered; the delivery of it commenced on the 21st of September, and was completed on the 29th of September. And on the 15th of October, 1825, a further agreement was entered into, relative to the purchase of some sheep, which bears date the 15th of October. The period at which the contract took place is of great importance, and I shall observe upon it presently. "Memorandum, 15th October, 1825. Mr. Mortimer "agreed with Mr. Benett to buy 500 ewes, at 46s. each; being "considered as the best price at Weyhill fair, and also 500 "wether lambs, at 24s. each; 500 ewes, at 46s. each, 1150l. "500 lambs, at 24s. each, 600l." And the two taken together came to 5750l. Now the time at which these sheep were actually purchased is ascertained by the evidence of Mr. Lampard and of Mr. Jay. The 10th of October was Weyhill fair, and the sheep had actually set off for Weyhill fair prior to the contract taking place between Mr. Benett and Mr. G. Mortimer; and Lampard puts the date at the 7th of October, as the time of the contract; and the other witnesses, although they do not actually speak to the 7th, speak to it with sufficient certainty, — they say that the sheep were gone, and that it was a day or two before Weyhill fair, which was on the 10th of

Wool, china, and books therein mentioned, to be
beyond the sum of 1000*l.*; and ordered that the

1837.

MORTIMER

v.

TREZEVANT.


October. The price was to be ascertained by the price of the
sheep at Weyhill fair, and therefore it is obvious that they
could not have concluded the contract till after the day of
Weyhill fair had elapsed; and accordingly it was not actually
reduced into the shape of a contract till the 15th of October.
It appears that after this an account was made out between
Mr. Benett and Mr. Mortimer, in which the value of the sheep
and the amount of the wool was put on one side, and the
rent on the other. Mr. Benett says that Mr. Farquhar's con-
sent was procured to the intended set off; and accordingly we
find on the document Mr. Farquhar's signature to it. Now
that circumstance, of requiring Mr. Farquhar's signature to the
contract, proves, at least, that the rent was in one account, and
the price of the wool and the sheep in another account. If
Mr. Mortimer had been entitled to the rent, Mr. Benett would
only have had to deal with the party entitled to the rent, but
as the rent belonged to Mr. Farquhar, and the money to be
paid for the wool and the sheep was to be paid on account of
Mr. Mortimer, it of course required Mr. Farquhar's consent
to set off the money so due from Mr. Mortimer, against the
rent so due from him to Mr. Farquhar. That becomes mate-
rial, when you see the way in which Mr. Mortimer claims it.
Mr. Mortimer does not say that Mr. Farquhar gave him the
rent, but Mr. Mortimer says, that he was entitled to the wool
and the sheep, and that Mr. Farquhar made him a present of
the wool and the sheep. Now it does not appear that Mr.
Farquhar ever had any thing to do with the wool and the
sheep; they were purchased by Mr. Mortimer, for his own use,
and all that Mr. Farquhar had to do with it, was to permit the
rent he was entitled to receive to go in part payment of what
Mr. Mortimer had to pay to Mr. Benett for the wool and the
sheep. But, however, one of these three documents is produced
for the purpose of establishing Mr. Mortimer's claim to this sum
of money, whether it be called wool or sheep, or whether it
be called rent. The document is dated September 20th, 1825.
It being now in proof that the contract for the sheep was signed
on the 15th of October, and had not any existence at an
earlier period than the 7th of October. The document runs
thus:— " Sep. 20, 1825. Dear George, I agree to give you all
" the Merino wool and sheep which Mr. Benett has given for

same be respectively allowed: and upon the Respondents the Plaintiff's third and fourth excep-

"payment of his rent, [at the date of this document no such transaction had taken place] to be manufactured at the mill for your use and benefit, likewise indigo, [that applies to another part of the case] for which I will give you an order upon the house in Broad-street; on my arrival in town I will make arrangements to give you a sufficient capital to carry on the mill to its extent, and it is my wish that the machinery should be upon the latest improvements." Now it is impossible to look at this document and not to see that it never could have been written before it was signed. It is obvious that the name is not signed in a place in which any person would have signed it, and it is obvious that the letters are all crowded together, for the purpose of its being completed, without interfering with, and running over the signature of Mr. Farquhar; that is plain upon the face of it, without any information being given as to the body, or under what circumstances it was prepared. Mr. Mortimer, or those who represent him, having the document, and having the means, therefore, as they are parties to it, of explaining all the circumstances arising on the face of evidence has been given, or attempted to be given. We find a document produced, with such observations arising on the face of it, and the facts prove that it refers to, and professes to be founded on a transaction which had not taken place at the time when it professes to bear date. I am, therefore, of opinion, that there is not only no evidence to show a present or gift of the wool and lambs, but that it is quite clear that Mr. Farquhar, although he permitted his rent to be set off, did not make a present of that rent, and that his estate, therefore, is entitled as against Mr. Mortimer to what was coming to him on the taking of that account.

There are two other sums, one of 266*l.*, being the amount of a cheque given upon a Mr. Knight, and 664*l.*, which is the ultimate balance which appeared to be due on the settlement of the account of the rent and the wool and sheep; with respect to which there must be further inquiry. It rests upon what is stated by Mr. Benett; there is proof by Mr. Benett of the cheque being given, but no positive proof of the cheque being paid; and Mr. Benett, with regard to the balance says, that he believes he paid it, not certainly stating it with that degree of certainty and precision, so as to make it safe to act on his own

tions, and the Respondent John Farquhar Fraser's fifth exception to the report, it was ordered that

1837.

 MORTIMER
 v.
 TREEVANT.

recollection ; there must therefore be a reference back to the Master, to inquire and ascertain whether, in point of fact, it was paid to Mr. George Mortimer or not.

That reduces the case to the question on the furniture and the indigo. With regard to the indigo, I confess I have more doubt and difficulty than I have as to any other part of the case ; and I think the conclusion to which I find myself compelled to come, may possibly deprive Mr. Mortimer of that which the intestate intended for him ; but I can only proceed on the evidence as it stands, and upon that evidence, I am bound to come to the same conclusion as that which I have already expressed as to the other points. Mr. Mortimer says, he claims the 2375*l.*, the price of the indigo, as being a gift to him by Mr. Farquhar. Now that transaction commences with a document (exhibit F.) dated the 24th of October, in which Mr. Farquhar writing to Mr. Bazett about some other matters, and then says, (speaking of Mr. Mortimer) “ He is a manufacturer of “ broad cloth, and will be much obliged to you for any information with respect to the future price of indigo ; in the meantime, pray give him any quantity on my account.” Now that evidence is again open to the same observation which I made with regard to the authority for the advance of money ; that nothing could be more improbable than that a person should give to another an authority to receive indigo to any amount. If it was intended as a present, however liberal men may be, they wish to be masters themselves as to the extent of their own liberality, and not refer it to somebody else to decide to what extent the gift is to go, however they might trust others as to how far it is safe to go by way of loan ; but the difficulty I feel arises from the evidence of Mr. Barnett, who is speaking of a transaction which it is clear does not refer to this indigo, but which raises a probability in my mind that Mr. Farquhar might intend to make Mr. Mortimer a present of some indigo. Mr. Barnett speaks to having seen some paper signed by Mr. Farquhar respecting some indigo, following a conversation which he says took place about the latter end of September, 1825. It cannot be this letter, because the dates do not correspond, and he speaks of that letter as only having been signed by Mr. Farquhar, whereas this exhibit is said to be altogether in his handwriting. The fact is, that the indigo was

1837.

MORTIMER
v.
TREZEVANT.

it should be referred back to the Master to inquire and state to the Court, whether the two sums of

bought and supplied, not from the stock in the house, for they had not any; but it appears, they authorised a broker to purchase it, and that the money charged as the price of the indigo purchased from another person, was placed to Mr. Farquhar's account by the house, who advanced the money. So far, therefore, the authority is not very strictly complied with, but I think, as far as the present lot of indigo is concerned, it rests upon the document F. attempted to be supported by the evidence of Mr. Barnett, which if he could be considered as speaking of this indigo, would be more important evidence than it is; but it is quite clear that he cannot be speaking of this indigo. The difficulty this evidence raises in my mind is, that it is general evidence of the intention of an advance of some quantity of indigo by way of present. But then again, this rests on one of these documents, the one I last alluded to, and which also includes the indigo. It is unnecessary to repeat the observations which I made upon that document; "I agree to give you all the Merino wool and sheep, which Mr. Benett has given for payment of his rent, to be manufactured at the mill for your use and benefit, likewise indigo, for which I will give you an order upon the house in Broad Street; and on my arrival in town, I will make arrangements to give you a sufficient capital to carry on the mill to its extent, and it is my wish that the machinery should be on the latest improvements." Now if the evidence to which I have adverted is sufficient to deprive that document of all credit, and to shew that it is a document not entitled to be received as evidence against the estate of Mr. Farquhar, which in my opinion it is not, it applies as much to the indigo as to the sheep, upon the effect of which I have before observed. There is no evidence of the present of the indigo; there is an authority to advance indigo on Mr. Farquhar's credit, for the benefit of Mr. Mortimer, and here the case rests. There is no other evidence but this document, which I think cannot be used in support of Mr. Mortimer's claim.

The next point is as to a sum of 1000*l.* according to one set of exceptions, and the sum of 1500*l.* according to another set of exceptions; which is with regard to the furniture at Fonthill, and which Mr. Mortimer claims as a present. I will take it at 1000*l.* I think the evidence proves it more satisfactorily as to its

266*l.* 1*s.* 4*d.* and 664*l.* 11*s.* 9*d.*, mentioned in the Respondents the Plaintiff's third and fourth ex-

1837.

MORTIMER

v.

TREEVANT.

value being 1000*l.* than 1500*l.* Mr. Coombes states the value to be 1000*l.*, there is other evidence which states it to be higher; but nothing could make it more improbable that Mr. Farquhar could intend to give the furniture as a present than the evidence of Mr. Phillips: though he does not speak to the particular furniture in question, he speaks to the mode in which Mr. Farquhar dealt with the furniture, and the profit which Mr. Farquhar determined to make out of it, which makes it extremely improbable that Mr. Farquhar could have intended to make a present of any part of the furniture to Mr. Mortimer. Then Mr. Coombes speaks to the value of the furniture removed as being 1000*l.*, and Delves also speaks to there being certain plate, which is a very important matter of consideration when we are enquiring whether there is evidence to show that this 1000*l.* worth of furniture was a present to Mr. Mortimer. The plate which was removed was worth 279*l.*, and the plate was not claimed; the plate was removed by Mr. Mortimer, but the plate is accounted for. There is the evidence of Mr. Studley for Mr. Mortimer; but although he is examined for Mr. Mortimer, he proves that the furniture was removed, and that it was said to be worth not more than 1000*l.*; so that upon this part of the case, I will take the value at 1000*l.* as being the amount: because the witnesses on both sides, Coombes on the one side, and Studley on the other, agree in fixing that as the value of the furniture removed. Now to prove that Mr. Farquhar intended to supply Mr. Mortimer with furniture and money to fit up his house and set up the factory, Mr. Studley is examined, and Mrs. Foxwell is called to speak to a conversation in which she heard Mr. Farquhar say, (but she does not say when) that he wished Mr. Mortimer to repair the Pavilion, and to take furniture for it from the Abbey; that is the whole, with the exception of the evidence of the document to which I am about to refer, and on which the case stands.

It is proved that the plate is not claimed, and the evidence of these parties go to the plate as well as the furniture removed, and they speak to the value.

Now we have the exhibit from which it is contended that this amounted to a gift of the furniture. It is the exhibit of December 6th, 1835. What it originally was is not very easy to ascertain. No account is given who wrote the body of it, when it

1837.


 MORTIMER

v.

TRESEVANT.

ceptions, making together the sum of 930*l.* 13*s.* 1*d.* mentioned in the Respondent John Farquhar

was written, or under what circumstances; but this is quite clear on the face of this document, that it did not originally contain the words which are now relied on as carrying the gift of the furniture and plate. It begins "Mr. George Mortimer, dear sir," all the former documents being "Dear George," this being "Dear sir," and then in different ink, (whether in a different hand I do not pretend to say, but introduced in a position which shews that it was introduced after the rest of the document was written), come the material words, "Mr. George Mortimer, dear sir. The plate, furniture, and fixtures, or "any of them," then there is "mat" part of the word "materials" in the new writing, and the rest of the word in the old writing; and those words are added by somebody or other, at some time or other. If they were added with the sanction of Mr. Farquhar, they would have carried the plate as well as the furniture; but the plate is not claimed, and the document itself on the face of it, is one which it is utterly impossible to give credit to. Mr. Farquhar may have signed that which was originally written; but there is no evidence whatever of his having signed it after these words were introduced; and those whose duty it was to explain the circumstances appearing on the face of the document, have not done that which it was incumbent upon them to do in order to support it. They have given no evidence when it was written, or in whose writing it is. I therefore must reject these three papers as totally unworthy of credit; and then the case stands on evidence which certainly falls very short of proving the gift to Mr. Mortimer by Mr. Farquhar.

There remains, however, one other article of 17 timber trees which were cut. Upon this subject the evidence is very conclusive, because Mr. Benett's evidence is, that he had agreed to purchase part of the estate, and that the timber was to be valued to him; and that a communication was made as to whether he would object to certain trees being cut down; and finding that they were not ornamental trees, and that he was only to pay for those trees that remained, he did not object; that afterwards certain other trees were cut, and then this transaction took place. Mr. George Sewell, to the 13th interrogatory proves, that Mr. Mortimer admitted he was to pay for

Fraser's fifth exception, were ever paid to the late Defendant George Mortimer or not: and his Honour held the Respondents the Plaintiff's seventh exception, and the Respondent John Farquhar Fraser's ninth exception to the report to be good and sufficient, and ordered, that the same should be allowed; but it was ordered that it should be referred back to the Master to inquire and state to the Court, what was the value of the timber and timberlike trees in the said exceptions mentioned: and his Honor held the Respondent John Farquhar Fraser's eighth exception to be good and sufficient, and ordered that the same should also be

1837.

MORTIMER
v.
TARZEVANT.

the timber trees; and that Mr. Mortimer said, that the timber trees were cut to be employed by him in building the house in which he was to live, and that they were to be considered as a present; Mr. Sewell proves, that he admitted that he was to pay for them; but Mr. Benett's is the most important evidence, for he proves that the cutting of the trees was after the 27th of December, 1825, the date of his contract, and that Mr. Mortimer afterwards came to him. Mr. Benett, not knowing that there was any difficulty between him and Mr. Farquhar, had mentioned to Mr. Farquhar the fact of these trees being cut, which excited Mr. Farquhar's surprise and anger against Mr. George Mortimer; and Mr. Mortimer then came to Mr. Benett and expressed regret that he had mentioned this circumstance, and desired that he would communicate to Mr. Farquhar that he was not dissatisfied with the trees being cut; and throughout the whole of that conversation representing the trees as cut by him without Mr. Farquhar's authority, and as timber trees for which he was liable to Mr. Farquhar. It is impossible to consider that these timber trees were given to Mr. Mortimer, therefore it must be considered, that for the value of these trees, Mr. Mortimer is liable to Mr. Farquhar's estate. I make no observation on the statue of Alderman Beckford: that is agreed on all hands, Mr. Mortimer removed, and he must account for the value of it; of course, that must also be included in the charge to Mr. Mortimer.

1837.

MORTIMER
v.
TRESEVANT.

allowed; but it was ordered that it should be referred back to the Master to inquire and state to the Court what was the value of the marble statue of the late Alderman Beckford, sold by the late Defendant George Mortimer, as in the said exception mentioned.

The appeal was against this order of the 11th of January, 1836, which had been signed and enrolled.

For the Appellants, Mr. *Knight* and Mr. *Koc-*

This was the proper subject of an action of *assumpsit* or some proceeding at law:—such relief could not be administered in equity, especially in a suit for the mere administration of assets; nor could the accidental circumstance, that if it were proved to be a debt owing to the estate, it might be set off against the distributive share of the debtor, give a right to change the jurisdiction. If it were a proper subject for the jurisdiction, great weight ought to be attributed to the oath of the Appellant, and no conclusion upon a question of such a fact as the genuineness or fabrication of documents ought to be decided without the verdict of a jury. It is a question of forgery, and in such cases, a court of equity always directs an issue to try the question of fact at law. *Barnsley v. Powel*.* Upon the case, even as it stood upon the evidence in equity, the preponderance of proof was greatly in favour of the Appellant. No securities are taken, and no interest paid or demanded. It appears by the evidence given on the part of the Appellant, that Mr. Farquhar had placed himself in the situation of a parent towards Mr. George Mor—.

* 1 Ves. sen. 143.

timer, and intended to advance him and promote his interest. It does not appear, that Mr. George Mortimer ever applied to Mr. Farquhar for the loan of any money, or to sell him any goods, and no evidence has been produced to shew, that Mr. Farquhar intended the 10,000*l.* in question as a loan to Mr. George Mortimer, or intended to call upon him to account for, or to pay for the goods that he received by the direction of Mr. Farquhar. Having regard to the magnitude of Mr. Farquhar's fortune, and the affection that he had for Mr. George Mortimer, who was the only one of his family that Mr. Farquhar was desirous of advancing in life, and to the fact, that Mr. Farquhar did not, in his lifetime, in any manner treat the money he had advanced to Mr. George Mortimer as money lent, or as a debt, nor ever call upon him to repay such money or any interest, or to account or pay for the goods he had received, the presumption independently of any evidence is, that Mr. Farquhar considered them as gifts. With respect in particular to the indigo, it is shewn by the Appellant's evidence, that Mr. Farquhar intended to give Mr. George Mortimer some indigo, and there is a total absence of any ground for supposing, that Mr. Farquhar intended to sell any indigo to Mr. George Mortimer, or that the latter intended to buy any indigo from Mr. Farquhar. The judgment ought to be reversed, or a trial at law directed. *Barnsley v. Powel*. * Part of the claim is barred by the statute of limitations.

For the Respondent, Mr. *Pemberton* and Mr. *Wigram*,

* 1 Ves. sen. p. 119.

1837.


MORTIMER
v.
RESERVANT.

Inquiries as to the outstanding estate of an intestate are usually directed, under decrees for administration of assets, and not to be dispensed with because one of the next of kin has part of the estate in his hands. As to the operation of the statute of limitations, the contest, as to the will, would prevent its occurring. If a Court of Equity has no doubt upon a question of fact, the case is not sent for the opinion of jury,—for no finding of a jury would alter the facts or the opinion of the Court; a verdict in favour of the claim would be unsatisfactory, and disregarded. *Nicol v. Vaughan*.* The evidence is conclusive in favour of the judgment; and it is applicable to each of the transactions in question, proving that the moneys, and other property, which are the subject of contest between the parties in this cause, were advanced to George Mortimer by the intestate, as loans, or came into his possession under circumstances which rendered him accountable for the same, and his estate is, therefore, properly charged with them by the order of the 11th of January, 1836.

The examination put in by the late Defendant, George Mortimer, has been falsified, and the case made by it wholly disproved by the evidence adduced by the Respondents, and the three pretended letters from the intestate (exhibits P. Q. and R.) stated in that examination, and relied upon as evidence of gifts from the intestate, are proved by the evidence to be false and counterfeit documents, and two of them, namely, the exhibits P. and Q., are obviously, and, upon inspection, forgeries or fabricated writings, and the third, the exhibit R.,

* *Antè*, Vol. VI. p. 104.

was falsified by the late Defendant, George Mortimer's own declaration upon oath.

Lord Brougham.—My Lords, this is a case of very considerable importance in point of amount, but of still greater importance and perhaps interest on the grounds on which it has been argued, if not on which the judgment rested in the Court below, and upon which at all events that judgment has been defended on behalf of the Respondents at your Lordships' bar. For these reasons, I should suggest to your Lordships the propriety of taking some time, some short time, to consider what judgment you will pronounce on the matter now brought before your Lordships.

I take it for granted, that on the question applying to the 10,000*l.*, in whatever way your Lordships dispose of that, if the party now taking the objection on the statute of limitations can satisfy the Court below, that he ought to be let in though he did not take the objection in the Master's office, nothing that could be done here, supposing the order of the Court below should be affirmed, would shut him out from the benefit of that proceeding below.

With respect to the main grounds on the merits of the case, as I stated before to your Lordships, it appears to me the safest course to take would be to let the case stand over for a few days, in order to give an opportunity of looking into the evidence which is undoubtedly conflicting in some particulars, though not much.

Lord Brougham.—The late Mr. Farquhar returned from India with a very large fortune, which before and subsequent to his return was

1837.

MORTIMER

v.

TREEVANT.

23d May,
1837.12th June,
1837.

1837.

MORTIMER

v.

TREZEVANT.

invested in land, in trade, and securities, in his banker's hands. He died in 1826 intestate, one of the Respondents immediately afterwards administering to his estate by taking out letters of administration, others of the Respondents then filed a bill for the administration of his estate and effects; and the usual decree having been made, the account being taken in the Master's office, a statement,—a charge was given by Mr. and Mrs. Trezevant, two of the Respondents; and Mr. Mortimer, whose widow is the Appellant, was examined on interrogatories, and the Master having made a report on the points chiefly raised by those interrogatories, exceptions were taken to his report, which coming on to be heard before the Master of the Rolls, now the Lord Chancellor, he was pleased to allow several of those exceptions, from which order allowing those exceptions the present appeal has been brought.

The statement, the state of facts and charge, the interrogatories, and Mr. Mortimer's examination upon them, the Master's report, and those exceptions thus allowed to that report by his Honour in the Court below, raised principally the question which has been almost alone argued at your Lordships' bar, whether or not certain considerable sums of money and certain goods, principally a large quantity of indigo of considerable value, which had been under Mr. Farquhar's authority and direction, came into the possession of the late Mr. Mortimer, had been so put into his possession by way of loan only or by way of gift; and whether therefore Mr. Mortimer, to the amount of those sums and for the value of those goods, was or was not accountable to the estate of the late Mr. Farquhar under the administration.

Now, my Lords, both at the time when this case was argued, and since, I have very carefully considered the evidence on both sides, upon which the contention of each party was sought to be maintained, and I have come to the opinion, without any hesitation whatever, that the judgment of his Honour in the Court below was well founded, and that Mr. Mortimer and the present Appellant as representing him, and the estate of Mr. Mortimer, was and is accountable to the estate of Mr. Farquhar, now under administration below to the amount of those several sums of money, and the value of those goods.

I purposely abstain from entering into the evidence in this case; I purposely abstain from giving any opinion upon the nature of that evidence; suffice it to say, that upon the consideration of the whole matter, and of the whole of that evidence, no doubt remains on my mind, that the Court below, in allowing the exceptions, came to a sound conclusion; and that your Lordships ought on this appeal to affirm the order of the Court below, allowing those exceptions.

I move your Lordships therefore, that that order of the Court below, on those exceptions to the Master's report, be affirmed; and be affirmed with costs, to be paid by the Appellant.

The Lord Chancellor. — It is a great satisfaction to me, that this case, which was argued before me when Master of the Rolls, has been heard in the presence of my noble and learned friend. Your Lordships have heard the impression which that argument has made on my noble and learned friend's mind; and I can only say, having fully

1837.

MORTIMER

v.
TREZEVANT.

1837.

MORTIMER

v.

TRESEVANT.

reconsidered the evidence in this case, and the arguments at the bar, I fully concur in his opinion.

Lord Brougham.—When I said that I had come to a conclusion in favour of the judgment of the Court below, without any hesitation, I ought to have mentioned that I had come to that conclusion with the exception of that part of it relating to the indigo,—a part on which the Court below itself expressed a doubt; but whatever that doubt below might be, the Court had applied its mind to it. I had at several times during the argument, and after considering the evidence, certainly been impressed with similar doubts; but upon the whole view of the case, I have come to the opinion, that, in that respect also, the judgment of the Court below was well founded; and that in respect of the value of those goods, as well as the others, the estate of Mr. Mortimer is rightly charged.

Judgment affirmed, with costs.

1837.

WALKER

v.

HARDMAN.

ENGLAND.

(COURT OF CHANCERY.)

SAMUEL WALKER, JONATHAN WALKER, VINCENT HENRY EYRE, and RICHARD STANLEY, } *Appellants ;*

JOHN HARDMAN, THOMAS COOKE, WILLIAM BAKER, and SOPHIA his Wife, CHARLES BAYLIS, and ANN his Wife, } *Respondents.*

L. & Co., carrying on trade at S., kept a banking account with **W. & Co.** bankers at S. The account consisted of bills and cash paid in by **L. & Co.**, and monies advanced on the credit of those payments by the bankers. In 1815, there being a large balance due, the bankers required security for the balance and their future advances, and accordingly a bond, — in the common form, with a penalty of 10,000*l.* to secure 5000*l.*, in which **W. F.** joined as a surety, — was given by the merchants to the bankers. In consequence of certain defects in this bond the bankers applied for an amended security, and a new bond, in a penalty of 20,000*l.* to secure 10,000*l.*, was executed by **L. & Co.**, with **W. F.** as a surety. There was evidence that, upon the treaty for the security, it was understood between the bankers and their customers that the bond was given to secure the floating balance; but the bond being in the common form, with interest from the day of execution, and it not appearing by any evidence that the purpose was explained to **W. F.**, the surety, who was a common farmer, and a man ignorant of business — the merchants having become bankrupt, — Held, in a creditor's suit, for administration of the assets of the deceased surety, that the bond must be taken as a security for the balance actually due when it was executed, subject to an account of subsequent payments made to the bankers by the principals.

1837.
WALKER
v.
HARDMAN.

IN and prior to the year 1815 the Appellants and Thomas Walker carried on business as bankers at Sheffield, in the county of York, in partnership together, under the style or firm of Walkers, Eyre, and Stanley, and they continued to carry on such business in partnership until the death of Thomas Walker.

At the same time Henry Lomas carried on business as a merchant in Sheffield ; and in the early part of the year 1815 he formed a partnership with Thomas Fidgeon and Edward Getley, which was to commence as from the 1st of January, 1815, and thenceforward Henry Lomas, Thomas Fidgeon, and Edward Getley, continued to carry on such business in partnership together, under the style or firm of Henry Lomas and Co., until their bankruptcy, which took place in the year 1816.

Previously to the year 1815, Henry Lomas kept an account with Walkers, Eyre, and Stanley, as his bankers ; and the new firm of Henry Lomas and Co. continued to deal with Walkers, Eyre, and Stanley, on the footing of the previous account between them and Henry Lomas. The usual mode of dealing between Walkers, Eyre, and Stanley, and their customers, was as follows :— When bills were brought to them by a customer, they did not discount each bill separately, as London bankers do, but carried such bills to the credit of the customer, and advanced money or bills to the amount required, whether more or less than the amount of the bills brought by the customer. Bills so credited and afterwards dishonoured were carried to the debit of the customer, and at the end of each year an interest account was

made out, in which the customer was debited and credited with interest on the different items on the debit and credit side of the account respectively, such interest being computed upon each item from its date to the end of the current year. And the customer was, after the end of the year, debited or credited with the balance of such interest account as the case might be.

In the month of August, 1815, the account of Henry Lomas and Co. being in a state very unsatisfactory to Walkers, Eyre, and Stanley, who held undue bills to a very large amount, for which they had given Henry Lomas and Co. credit, and notwithstanding such credit, the amount of the creditor side of their account falling short by a considerable sum of the debtor side, the Appellant Richard Stanley, and (by his directions), William Dyson (then clerk to Walkers, Eyre, and Stanley), made applications to Henry Lomas, both personally and through Richard Wood (then clerk to Henry Lomas and Co.), calling upon Henry Lomas and his partners, Thomas Fidgeon and Edward Getley, to give security to Walkers, Eyre, and Stanley for the advances which they had already made or might thereafter make to Henry Lomas and Co. To these applications Henry Lomas always replied, that he and his partners were ready to give security to the amount of 10,000*l.* or upwards, to Walkers, Eyre, and Stanley for the advances made and to be made by them to him and his partners; and in the result of such applications a bond was, in the month of August, 1815, executed and delivered by Henry Lomas, Thomas Fidgeon, and Edward Getley, and by William Fidgeon (a brother of Thomas Fid-

1837.



WALKER

v.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

geon) as a surety, whereby they became bound to the Appellants and their then partner Thomas Walker, under the partnership firm of Walkers, Eyre, and Stanley, in the penal sum of 10,000*l.*, conditioned for payment by Henry Lomas and Co. to Walkers, Eyre, and Stanley of 5000*l.* within six months after demand.

This bond was given as a standing security, to the extent of 5000*l.*, for what might be due to Walkers, Eyre, and Stanley from Henry Lomas and Co. on the balance of account.

Shortly after the execution of this bond, the Appellant, Richard Stanley, through the said Richard Wood, applied to Henry Lomas to have the bond altered, in certain particulars not affecting the nature and purpose of the bond as a standing security for the floating balance. To these alterations Henry Lomas consented; and at the same time he proposed that instead of altering the bond, a new one should be executed for securing double the amount; and in consequence the bond in question in this cause was (under Henry Lomas's directions) prepared by the solicitor of Henry Lomas and Co. and executed by Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, as surety.

This bond bears date the 26th of August, 1815, and is a joint and several bond by Thomas Fidgeon, Edward Getley, Henry Lomas, and William Fidgeon, to Thomas Walker, and the Appellants (the Appellant Vincent Henry Eyre being therein by mistake called Vincent Eyre) in the common form and in the penal sum of 20,000*l.* conditioned for the payment of 10,000*l.* “*upon demand with law-
ful interest for the same from the date thereof.*”

On the day of the delivery of this new bond at the banking-house of Walkers, Eyre, and Stanley, or on the following morning, Henry Lomas made out and delivered to Walkers, Eyre, and Stanley, a list of moneys which would be accruing, due to Henry Lomas and Co. from sundry persons in the course of the then ensuing months of September, October, and November, and of the advances, amounting to 12,000*l.* or thereabouts, which they expected they should have occasion for from Walkers, Eyre, and Stanley, in the course of the month of September; and the list exhibited the particular days on which such advances would be wanted.

In compliance with this application, Walkers, Eyre, and Stanley, within a few weeks after the execution of the bond, made further advances to Henry Lomas and Co., to the extent of 12,000*l.* and upwards.

The bond, dated 26th August, 1815, was executed by Henry Lomas on that day, or on the 27th, 28th, or 29th of that month, in the presence of, and attested by Richard Wood, having been previously signed by the other obligors; but it appears that such execution thereof by Edward Getley was not attested, and the execution thereof by Thomas Fidgeon and William Fidgeon was attested only by Mary Fidgeon, the daughter of Thomas Fidgeon. On the 11th January, 1816, Walkers, Eyre, and Stanley, being dissatisfied with the state of the account of Henry Lomas and Co. with them, instructed Charles Brookfield, as their attorney, to endeavour to obtain from Henry Lomas, and Co. a reduction of the account, and from William Fidgeon a satisfactory security for

1837.

WALKER

v.

HARDMAN;

1837.

WALKER
v.
HARDMAN.

the 10,000*l.* due on the bond. Charles Brookfield, considering it desirable that the execution of the bond by Edward Getley should be attested, and the execution thereof by Thomas and William Fidgeon be attested by an indifferent witness, had an interview on the 13th January, 1816, with Edward Getley, who then acknowledged his signature, and re-executed the bond of the 26th August 1815 in his presence. At that interview Charles Brookfield told Edward Getley, and Edward Getley admitted, that the balance of the account was upwards of 20,000*l.*; and Charles Brookfield told Edward Getley that the obligees were determined to have it reduced, whereupon Edward Getley held out promises of an early reduction of the account. On the same 13th January 1816, Charles Brookfield had an interview with William Fidgeon, and produced to him the bond of the 26th August, 1815, when William Fidgeon acknowledged his handwriting thereto, and re-executed it in Charles Brookfield's presence.

At the same interview, Charles Brookfield told William Fidgeon that the parties were dissatisfied to hold merely a bond as their security; and that understanding that he had considerable freehold property, they expected the 10,000*l.* to be secured either by a mortgage or a deposit of title deeds relating to property of competent value, or he must pay the money. And, after some further conversation, Charles Brookfield having told William Fidgeon, that his instructions were, to have either the security required or the money, William Fidgeon promised to consult a friend on the subject and to meet Charles Brookfield on the following morning

and, accordingly, on the 14th of January, 1816, Charles Brookfield had another interview with William Fidgeon, at Thomas Fidgeon's house. At this interview William Fidgeon at first refused to give any further security, whereupon Charles Brookfield told him, in the presence of Edward Getley, that if he, William Fidgeon, did not give security, he must immediately pay the money, or the obligees would proceed against him on the bond. After some further conversation, William Fidgeon consented to give the security, and promised to bring his title deeds to Charles Brookfield the next morning. But this promise he did not perform.

On the 27th of March, 1816, the Appellant, Richard Stanley, together with Charles Brookfield, had an interview with Edward Getley, when the Appellant, Richard Stanley, peremptorily demanded of Edward Getley, that the account should be reduced; and thereupon Edward Getley gave the Appellant bills of exchange amounting to 10,000*l.*, drawn by Henry Lomas and Co. on Alexander Levi, or Alexander Levi and Co., but which, when presented for acceptance, were dishonoured.

On the 3d day of May, 1816, William Fidgeon died intestate, possessed of some personal estate, and seized of or entitled to considerable freehold estate. He left Thomas Fidgeon his brother and heir at law; and, after his death, letters of administration of his personal estate were granted by the Consistory Court of the Bishop of Litchfield and Coventry to the defendant Sam Cave Fidgeon.

On the 30th day of May, 1816, a commission of bankrupt, under the Great Seal of Great Britain,

1837.


WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

was issued against Henry Lomas, Edward Getley and Thomas Fidgeon, who were duly found and declared bankrupts under the same. The Respondents, John Hardman, and Thomas Cooke together with the late Defendant, Peter Kempson since deceased, were appointed assignees of the estate and effects of the bankrupts under the commission; and the usual assignment of the personal estate of the bankrupts, and the usual bargain and sale of their freehold estates were executed to them by the major part of the commissioners in and by such commission named and authorised. The bargain and sale bore date in the month of July, 1816, and was in due time enrolled in the Court of Chancery; and thereby the freehold estates of William Fidgeon were vested in the assignees, but charged with the bond and the other specialty debts of William Fidgeon.

On the 3d of July, 1816, the Appellants, together with their partner, Thomas Walker, on behalf of themselves and all other the creditors of William Fidgeon, deceased, filed their original bill in this cause in the Court of Chancery, (which was afterwards twice amended,) against the Respondents John Hardman, and Thomas Cooke, and the said late Defendant, Peter Kempson, (assignees of the said bankrupts Henry Lomas, Thomas Fidgeon, and Edward Getley,) and against the said late Defendant, Sam Cave Fidgeon, (as administrator of the said William Fidgeon deceased,) thereby setting forth (among other things) the facts before stated, the bond of the 26th of August, 1815, and a demand and refusal of payment; and thereby praying, that an account might be decreed to be taken of the personal estate

and effects which the intestate William Fidgeon **was** at the time of his death possessed of, entitled **to**, or interested in, and which had been possessed **by** or come to the hands of Sam Cave Fidgeon, **and** of his application thereof; and also an account **of** the intestate's funeral expenses, and of the **ex-**
penses of the letters of administration, and after **sa-**
tisfaction thereof, that the assets might be applied **in** payment of the debt due to Plaintiffs, and of **the** other debts due and owing by the intestate at **the** time of his death, in a due course of adminis-
tration; and, in case the intestate's personal estate **and** effects should be found insufficient for the **payment** of his specialty debts, then that his real **estate**, or a competent part thereof, might be **decreed** to be sold, and the money arising from **such** sale applied in payment of his specialty debts; **and** that all necessary parties might be decreed to **concur** in such sale; and in case the money pro-
duced by such sale, together with the intestate's **personal** estate, should be found insufficient for the **payment** of the intestate's specialty debts, then **that** an account might be taken of the rents and **profits** accrued and to arise until such sale, and that **the** same might be applied in payment of the spe-
cialty debts; and that, for that purpose, some **proper** person might be appointed to prove the **amount** of such rents and profits received by **Thomas** Fidgeon as a debt under the commission; **and** that so much of such rents and profits as **should** appear to have been received by **John** Hardman, Peter Kempson, and Thomas Cooke, or **any** or either of them, might be answered by them **or** him respectively: and that in the mean time the **said** John Hardman, Peter Kempson, and Thomas

1837.
WALKER
D.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

Cooke might be restrained, by the order and injunction of the Court, from selling or disposing of the intestate's real estate, or any part thereof, and for general relief.

All the Defendants appeared, and put in their answers to the bill; and the answer of the Defendants, the assignees, contained the following passage, that is to say: — “ They believe it to be true that the sum of 10,000*l.*, and some interest for the same, hath not been paid to the said complainants, but whether the whole of the said principal sum and interest from the date of the said bond is now due, or the amount of what is now due thereon for principal and interest on the security of the said bond, or whether the said complainants have or have not made such demand as in the said bill mentioned, these Defendants cannot set forth as to their knowledge, information, belief, or otherwise.”

The Plaintiffs having replied to the answers, evidence was given, proving the allegations of the bill as before set forth, and examined Richard Wood, Mary Fidgeon, Charles Brookfield, and Robert Neville, to prove the bond and demand.

On the 31st of July, 1819, the original cause was heard before the Vice-Chancellor, when a decree was made, whereby it was among other things ordered and decreed, that it should be referred to Mr. Harvey, one of the Masters of the Court of Chancery, to take an account of what was due to the Plaintiffs, and all other the creditors of William Fidgeon, deceased, the intestate in the pleadings named, and also an account of his personal estate come to the hands of Sam Cave Fidgeon, and of his funeral expenses, with the usual directions:

And it was ordered, that the intestate's personal estate should be applied in payment of his debts and funeral expenses, in a course of administration: And it was ordered, that the Master should inquire what real estates the intestate died seised of; and whether the same were subject to any and what incumbrances, and in whom those incumbrances were vested: And it was ordered, that the Master should inquire whether any and what sum or sums of money had been received by the Plaintiffs, or by any other person or persons, for their or either of their use on account of the said bond? And the Court reserved the question, whether the sums to which the estate of the intestate was liable ought to be paid out of his real or personal estate? And it was ordered, that the Master should inquire whether the Plaintiffs held any, and what other securities for the money mentioned in the bond?

Under this decree the Defendants took in no charge or state of facts, but they exhibited interrogatories for the examination of the Appellants and the Plaintiff, Thomas Walker.

To these interrogatories the Appellants and Thomas Walker put in an examination, stating that Thomas Fidgeon, Edward Getley, and Henry Lomas, were, at the time of their bankruptcy, indebted to them in the sum of 28,742*l.* 17*s.* 9*d.*, on balance of the banking account, kept with them by Thomas Fidgeon, Edward Getley, and Henry Lomas, and as a security for which balance the bond was given; and that the sum of 26,975*l.* 19*s.* 3*d.*, or thereabouts, was then due and owing to them on the balance of the said account; and they said they had not received any sum of money on account of the bond; and that they did not hold any securities

1837.

WALKER

v.

HARDMAN.

1837.
 WALKER
 v.
 HARDMAN,

given to them for securing the payment of the money mentioned in the bond, but that they held sundry bills of exchange, and some other securities given to them for securing the payment of the said balance of account; and which bills and other securities they held, together with the said bond, for that purpose.

The Defendants, the assignees, having obtained an order, referring the examination to the Master for insufficiency, the Master was of opinion that the same was not sufficient, in not setting forth the particulars of the securities held by the examinants. The Appellants and Thomas Walker thereupon put in a further examination to the interrogatories, and thereby stated that the bond was given to the extent of 10,000*l.*, for the balance of the banking account in their former examination mentioned; which balance, at the date and execution of the said bond, exceeded, and had ever since exceeded, and did then exceed the sum of 10,000*l.*; and that the same bond was not given for any other specific sum of money: And they said, that besides the bond they held sundry bills of exchange as securities for the balance of their banking account, and which were given to the examinants by Thomas Fidgeon, Edward Getley, and Henry Lomas: And they set forth, in a schedule to their examination, the particulars of such bills.

The Defendants laid before the Master no evidence, (except the said examinations), on the matter of the inquiry directed by the decree respecting the bond.

On the 16th of July, 1821, the Master made his general report, and thereby, among other things, certified that a sum of 12,913*l.* 7*s.* 10*d.* was due to the Plaintiffs from the intestate on the bond, for

Principal and interest to the date of his report. And as to that part of the decree, which directed him to inquire whether any, and what sums of money had been received by the Plaintiffs, or by any person or persons for their or either of their use, on account of the bond, and whether the Plaintiffs held any other, and what security, for the money mentioned in the bond, the Master, (after setting forth the substance of the original examination, and further examination), certified as follows: — “ Upon consideration of the said examinations, and no other evidence having been produced before me, I find that no sum of money has been received by the Plaintiffs, or any person, for their or either of their use, on account of the said bond, and that they hold the bills of exchange before mentioned, (being the bills mentioned in the schedule to the further examination) jointly with the said bond as securities for the balance due to them on the said banking account.”

The Respondents, John Hardman and Thomas Cooke, and Peter Kempson, took four exceptions to the report.

First, For that the said Master, in and by his said report, has certified that no sum of money had been received by the Plaintiffs, or any person for their or either of their use, on account of the bond in the said report mentioned; whereas he ought to have certified that the Plaintiffs did, after the date of the said bond, receive divers sums of money on account of the balance alleged to be due to them, and that such balance was wholly paid off, or greatly reduced below the sum of 10,000*l*.

Second, For that the said Master, in and by his

1837.

WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

said report, has certified that the Plaintiffs held the bills of exchange in the pleadings mentioned, jointly with the said bond, as securities for the balance due to them on the banking account in the pleadings mentioned; whereas he ought to have certified that the said bond was not given to secure the balance of their banking account, and that the same was given to secure such balance as was then due, or alleged to be due, to them at the time when the said bond was given, or so much thereof as did not exceed the sum of 10,000*l*.

Third, For that the said Master has received in evidence the examination of the said Plaintiffs, in support of the allegation of the said Plaintiffs, and has founded his report thereon; whereas the said Defendants are advised, and submit, that the same is not evidence against the said Defendants.

Fourth, For that the said Master has not taken an account of what was due to the Plaintiffs, as he was directed to do, by the said Thomas Fidgeon, Edward Getley, and Henry Lomas, at the time of the said bankruptcy, and has certified by his said report that the said bond is a security for such balance; whereas, he ought to have certified that the said bond is not a security to them for such balance, and only for so much, if any, of the said debt, which was due and owing to them at the time when the said bond was given, as now remains unpaid, but which the said Master has declined to inquire into or ascertain.

On the 19th of July, 1822, the exceptions having been argued before the Vice-Chancellor: “It was ordered, that it be referred back to the Master, Mr. Harvey, to review his report, and the Master was to inquire and state to the Court,

“ whether the bond, dated the 26th of August,
 “ 1815, in the pleadings mentioned, was to be held
 “ as a security for the particular balance due to
 “ the Plaintiffs on the banking account, at the date
 “ of the bond, or for the general balance which
 “ should from time to time remain due to them ;
 “ and if the Master should be of opinion that the
 “ bond was to be held only as a security for the
 “ particular balance due. at the date of the bond,
 “ then the Master was to inquire and state to the
 “ Court whether any and what sum remained due
 “ to the Plaintiffs on such bond, from the estate of
 “ the intestate ? And the Master was to state any
 “ circumstances specially to the Court, at the re-
 “ quest of either party : And, for the better dis-
 “ covery of the matters aforesaid, the parties were
 “ to produce before the Master, upon oath, all
 “ books, papers, and writings, in their custody or
 “ power, relating thereto, and to be examined upon
 “ interrogatories as the Master should direct.”

The Appellants and Thomas Walker, under this
 Order, examined William Dyson, who deposed as
 follows : —

This Deponent saith that the complainants ad-
 vanced monies, and discounted bills, to and for the
 use of the firm of Henry Lomas and Co., though
 not by taking discount on each bill separately, as
 is the mode adopted by London bankers, but ac-
 cording to the practice in use with the said com-
 plainants, of carrying any bills brought in to the
 credit of the parties so depositing them, and ad-
 vancing monies to such parties to the amount re-
 quired, whether more or less than the amount of
 such bills, and at the end of the year an interest-
 account was made out, in which the parties having

1837.
 WALKER
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

accounts with the said complainants were either debited or credited for interest, as the case might be: and this deponent further saith, that according to such practice the said complainants, in their account with the said firm of Henry Lomas and Co., gave such last mentioned firm credit for all undue bills of exchange handed to the said complainants, as well as for cash received for and on account of the said firm: and this deponent further saith, that he had, in the month of August, 1815, when he was clerk and book-keeper in the said banking-house of the said complainants, the means of knowing the state of the account between the said complainants and the said firm of Henry Lomas and Co.; and this deponent has recently inspected and examined the books of the said complainants, and saith, that it appears from the account therein contained between the said complainants and the said Henry Lomas and Co., that there were, up to the 26th of August, 1815, sums amounting to 151,763*l.* 12*s.* 10*d.*, to the debit of the said Henry Lomas and Co., and to their credit sums amounting to 149,387*l.* 15*s.* 8*d.*, leaving balance on the said 26th of August, 1815, of 2,375*l.* 17*s.* 2*d.*, in favour of the said complainants. And this deponent further saith, that in consequence of the account of the said firm of Henry Lomas and Co. with the said complainants becoming over-drawn to a considerable extent, in and about the month of August, 1815, this deponent on behalf of the said complainants, and by the directions of the said complainant Richard Stanley, who was the acting partner to the said complainants said banking-house at Sheffield aforesaid, made several applications to the said Henry Lomas, that

he the said Henry Lomas and his partners Thomas Fidgeon and Edward Getley should give security to the said complainants for the advances which they the said complainants had already made, and might thereafter make, to the said firm of Henry Lomas and Co. ; and the said Henry Lomas always replied, that he and his partners the said Thomas Fidgeon and Edward Getley were ready when called upon, to give security to the extent of 10,000*l.* or upwards to the said complainants for the advances made and to be made by them to him the said Henry Lomas and his partners : And this deponent further saith, that, to the best of his knowledge and belief, the said complainant Richard Stanley made similar applications, and about the same period to the said Henry Lomas, and received from him similar answers, as this deponent understood from the said complainant Richard Stanley, who used, about the period aforesaid, frequently to tell this deponent that he was going to apply again to the said Henry Lomas for security, and upon returning from the said Henry Lomas used to communicate to this deponent what had passed between him the said complainant Richard Stanley and the said Henry Lomas : And this deponent further saith, that as the result of the aforesaid applications, it was arranged and agreed that the said Henry Lomas, and his partners Thomas Fidgeon and Edward Getley, should give security to the said complainants to the amount of 10,000*l.*, by a bond, for the advances which the said complainants then were or might thereafter be under to or on account of the said firm of Henry Lomas and Co. That sometime in the month of August, 1815, a bond, purporting to be executed by Henry

1837.


WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, to the said complainants, in the penal sum of 10,000*l.*, was delivered to the said banking-house by or on the part of the said firm of Henry Lomas and Co. : and this deponent saw such bond amongst the securities belonging to the said banking-house, but cannot now recollect the date or particulars thereof, or the purport and effect of the condition thereof, except that by such condition the sum of 5,000*l.* was made payable to the said complainants by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon : And this deponent further saith, that, to the best of his knowledge and belief, that bond was executed and given to the said complainants as a security to the amount of the said sum of 5,000*l.*, for what might at any time be due to the said complainants from the said firm of Henry Lomas and Co., on the balance of the account between them, and not merely to cover the actual balance due from such firm at the time when the said bond was executed ; for this deponent saith, that it was the uniform practice of the said banking-house to require security (where they required security at all) from persons keeping cash with them for the general balance which might from time to time be due to the said banking-house, to the extent of the sum mentioned in such security ; and it was for such a security that this deponent applied to the said Henry Lomas as aforesaid ; and this deponent distinctly understood, both from the said Henry Lomas and the said complainant Richard Stanley before the said bond was given, as afterwards, that it was to be a security to the said banking-house for the balance which might at

any time be due to the said banking-house from the **said** firm of Henry Lomas and Co. in the account **between** them to the extent of 5,000*l.* and this **deponent** always considered and believed the said **bond** to have been given as such security :—

That the said bond mentioned in this deponent's answer to the last preceding interrogatory, was, shortly after the same had been given to the said banking-house, returned by the said complainant Richard Stanley to the said Henry Lomas, or some part of the said firm of Henry Lomas and Co., and, to the best of this deponent's recollection and belief, for the purpose of a new security being given to the said complainants to double the amount of the said bond : And this deponent further saith, that a new bond was shortly afterwards delivered to the said banking-house, purporting to be executed by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, to the said complainants, in the penal sum of 20,000*l.*, and conditioned for the payment of 10,000*l.* : And this deponent further saith, that he has looked upon the partly written and partly printed paper or bond now produced and shewn to him at this the time of his examination, marked with the letter A : and saith, that the same is the new bond or security which was given to the said complainants by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, as aforesaid, in lieu of the said former bond, by the condition of which 5,000*l.* only was made payable to the said complainants : And this deponent further saith, that he is not aware that the said produced bond differs in any other respect from the said former bond, besides the amount of the penalty and of the sum

1837.


WALKER
v.
HARDMAN.

1837.

WALKER
vs
HARRISON.

made payable by the condition thereof: And this deponent further saith, that, to the best of his knowledge and belief, the said alteration of doubling the amount of the said former bond was made at the suggestion of the said complainant Richard Stanley; for this deponent remembers the said last named complainant telling this deponent, about the time when the said former bond was returned to the said Henry Lomas, that he, the said last named complainant, had been to the said Henry Lomas and expressed his desire that a bond for 10,000*l.* instead of the said bond for 5,000*l.* should be given to the said complainants, and that he the said Henry Lomas had agreed to comply with that request; and this deponent believes that the said produced bond was prepared by a Mr. Thompson, as the solicitor of the said firm of Henry Lomas and Co.; this deponent however saith, that he had no conversation either with the said Henry Lomas or the said Edward Getley, with respect to the giving of the said new bond, nor was this deponent the person through whom the directions for preparing the same were conveyed: And this deponent further saith, that the said produced bond having been substituted for the said former bond, was given for the same purposes for which such former bond was given, and as that former bond was, to the best of this deponent's knowledge and belief, and as this deponent doubts not, under the circumstances and for the reasons mentioned in this deponent's answer to the last preceding interrogatory, given to the said complainants as a security for what might at any time be due to them from the said firm of Henry Lomas and Co. on the balance of account between them, this deponent,

•
 For the same reasons and under the circumstances, is positive that the said produced bond was likewise intended as a security of the same nature, to the extent however of 10,000*l.* instead of 5,000*l.* : That he has again looked upon the said produced bond marked A, and saith, that the same appears to have been executed on the 13th of January, 1816, by the said Edward Getley and William Fidgeon; and this deponent further saith, that the following was the state of the account between the said banking-house and the said firm of Henry Lomas and Co. on the 26th of August, 1815, and the 13th of January, 1816, respectively, (that is to say), on the 26th of August, 1815, the balance of such account amounted to the sum of 2,375*l.* 17*s.* 2*d.*, and the said banking-house then held undue bills belonging to such firm to the amount of 44,596*l.* 2*s.* 7*d.*; and on the 13th of January, 1816, the balance of the said account amounted to the sum of 24,731*l.* 1*s.* 4*d.* against the said firm of Henry Lomas and Co., and the said banking-house then held undue bills belonging to such firm to the amount of 6,789*l.* 18*s.* 6*d.* : And this deponent saith, that the said balances, on the 26th of August, 1815, and the 13th of January, 1816, respectively, are computed by giving the said firm of Henry Lomas and Co. credit for bills not then due : That he recollects that about the time when the said produced bond was given, the said Henry Lomas applied to the said complainant Richard Stanley as the acting partner in the said banking-house, for further advances to be made by such banking-house for the use of the said firm of Henry Lomas and Co., though to what amount this deponent cannot remember; and this deponent further saith, that about the same time the said Henry.

1837.

WALKER

BARNHAM

1837.

WALKER

v.

HARDEN.

Lomas, on the part of himself and his partners in the firm of Henry Lomas and Co., delivered to the said complainant, Richard Stanley, a list or statement of the monies which the said firm of Henry Lomas and Co. would require from the said banking-house: And this deponent has looked upon the paper writing, now produced and shewn to him at this the time of his examination, marked with the letter L., and saith, that the same is the list or statement which was so delivered by the said Henry Lomas to the said complainant, Richard Stanley, as aforesaid: That the said complainant, Richard Stanley, on the part of himself and his said partners in the said banking-house, agreed to make, and did accordingly make, the advances mentioned in the said produced list or statement marked L., to and for the use of the said firm of Henry Lomas and Co.; and this deponent saith, that he knows, from his communications with the said complainant, Richard Stanley, and the said Henry Lomas, upon the subject of the state of the account between the said banking-house and the said firm of Henry Lomas and Co., that the said advances were made by the said banking-house on the faith and security of the said produced bond, and that such advances would not have been made if security to the amount of 10,000*l.*, or some such amount, had not been given by the said firm of Henry Lomas and Co. to the said complainants: that before the said produced bond, and the said former bond which was returned, were given to the said complainants, this deponent repeatedly heard the said complainant, Richard Stanley, refuse to the said Henry Lomas any

* By this document it appeared that about 12000*l.* was required.

Further advances, until some security was given by the said firm of Henry Lomas and Co.; and this deponent, by the directions of the said last-named complainant, refused similar applications for money made by the said Henry Lomas; and when this deponent was directed by the said complainant, Richard Stanley, to apply to the said Henry Lomas for security as aforesaid, in the month of August, 1815, the said complainant Richard Stanley repeatedly declared that the said banking-house would make the said firm of Henry Lomas and Co. no further advances, until the required security had been given by the said firm to the said banking-house, and directed this deponent so to tell the said Henry Lomas; and this deponent accordingly did so: That his opportunities of knowing the matters deposed to by this deponent as aforesaid were from his having been clerk and cashier to the said complainants during the period aforesaid; and this deponent saith, that as such clerk and cashier, he kept, or assisted in keeping, the books of the said banking-house, and paid and received the monies paid and received by or on account of the said banking-house, and nearly all the cash and bill transactions between the said banking-house and the said firm of Henry Lomas and Co. passed through this deponent's hands, and this deponent was continually in the habit of communicating both with the said complainant, Richard Stanley, and the said Henry Lomas upon the subject of such transactions.

Richard Wood, who had been clerk to the Plaintiffs, deposed that Henry Lomas, Thomas Fidgeon, and Edward Getley, jointly with William Fidgeon, deceased, executed a bond to the said

1837.

WALKER

v.

HARDMAN.


1837.


WALKER
&
HARDMAN.

complainants, under their firm of Walkers, Eyre, and Stanley, sometime about the middle of August, 1815, but what was the precise date thereof this deponent cannot recollect; that by such bond Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, jointly and severally bound themselves in the penal sum of 10,000*l.* to the firm of Walkers, Eyre, and Stanley, of Sheffield, bankers, to pay to such last-mentioned firm the sum of 5000*l.*, and, as near as this deponent can now recollect the contents of such bond, within six months after demand being made by such firm; and this deponent saith, such bond was executed under the circumstances mentioned in this deponent's answer to the last preceding interrogatory; and, that, to the best of his knowledge and belief, the same was executed as a security to the said complainants for the general balance of the accounts subsisting between the complainants and the firm of Henry Lomas and Co., to the extent of the sum of 5000*l.*, made payable as aforesaid by the condition of the said bond; for this deponent saith, that at the time of the said bond being delivered to the said complainants, he this deponent distinctly considered and understood the said bond to have been given by the firm of Henry Lomas and Co. as a standing security for the general floating balance of the account current between that firm and the complainants, to the extent of the sum of 5000*l.*, and Henry Lomas, who was the only partner in the firm of Henry Lomas and Co., residing at Sheffield, and with whom this deponent had any communication on the subject of the bond, always so treated, and spoke of, and considered the said bond, in his conversations with this deponent

respecting the same, both at the time when the same was given to the complainants and afterwards: That shortly after the bond had been delivered to the banking-house, the complainant, Richard Stanley, expressed to this deponent his wish that the bond should be altered in two or three particulars; in the first place, that the money made payable by the condition should be made payable generally, and without the clause within six months after demand; in the next place, that the partners comprising the firm of Walkers, Eyre, and Stanley, the obligees in the bond, should be named individually; and in the third place, that the execution of such bond by Thomas Fidgeon, Edward Getley, and William Fidgeon, should be attested by some professional person, instead of Mary Fidgeon, because she, being the daughter of Thomas Fidgeon, there might be some difficulty in producing her as a witness to prove the execution of such bond, should circumstances require her evidence; and that the bond was then delivered to this deponent by the complainant, Richard Stanley, for the purpose of being altered as aforesaid; and this deponent communicated to Henry Lomas the alterations therein, which the complainant, Richard Stanley, had desired to be made, and Henry Lomas acquiesced in such alterations, and agreed to procure a new bond in the form proposed by the complainant, Richard Stanley; and this deponent saith, that Henry Lomas had, in the interval between the delivery of the first bond to the complainants and its return by the complainant, Richard Stanley, more than once expressed to this deponent his regret that the first bond had not been conditioned for the payment of 10,000*l*.

1837.


WALKER
&
HARDMAN.

1837.
WALKER
v.
HARDMAN.

instead of 5000*l.*, as he the said Henry Lomas, had understood that William Fidgeon would not have objected to join in a bond to that amount; and when the first bond was returned by the complainant, Richard Stanley, Henry Lomas proposed that, instead of altering that returned bond, a new one should be executed in the form suggested by the complainant, Richard Stanley, with the additional alteration of doubling the penalty and the sum made payable by the condition, but Henry Lomas desired this deponent not to mention that last-mentioned variation to the complainant, Richard Stanley, until the new bond should have been agreed to and executed by his partners and William Fidgeon, lest either of them should not consent thereto; that by the directions of Henry Lomas, this deponent, on the same day that the former bond had been returned as aforesaid, procured a stamped printed form of a bond in blank, and took the same, together with the bond returned as aforesaid by the complainant Richard Stanley to Mr. Thompson, solicitor, of Sheffield, and instructed him to fill up such blank form according to the form suggested by the complainant, Richard Stanley, and with the additional variation of making the penalty of the new bond 20,000*l.* instead of 10,000*l.*, and the sum payable by the condition thereof 10,000*l.* instead of 5000*l.*; that the said Mr. Thompson accordingly on the same day filled up and prepared such new bond, in pursuance of the aforesaid instructions conveyed to him by this deponent; that the produced bond was substituted for the said former bond, and was given to the complainants as the same sort of security, and for the same purposes as the former

bond, and was at the time of its being delivered to the banking-house, considered and believed by this deponent to have been given to the complainants as a security for the general floating balance which should from time to time be due to the complainants from the firm of Henry Lomas and Co. to the extent of 10,000*l.*, and Henry Lomas so spoke of and treated the said produced bond as such security in his conversations with this deponent upon the subject thereof, both at the time when it was given to the said complainants and afterwards. That some time about the 29th of August, 1815, Henry Lomas directed this deponent to make out a statement of the monies which the firm of Henry Lomas and Co. would require in the course of the month of September in the same year, of the amount of bills which would be paid off in the course of September, October, and November, 1815; and this deponent understood from Henry Lomas that he intended applying to the banking-house for other advances of money, and that such statement was for the purpose of being exhibited to the complainant, Richard Stanley, upon such application, in order to shew him that the firm would require but 12,000*l.* to be advanced by the banking-house, whereas there was paper in the course of payment, which in the month of September, 1815, was expected to produce 24,750*l.* or thereabouts, in the month of October 9517*l.* or thereabouts, and in November 5700*l.* or thereabouts; that as subsequent advances were made by the banking-house, to and for the use and benefit of the firm of Henry Lomas and Co., in the month of September, 1815, this deponent believes that Henry Lomas made the intended application for

1837.

WALKER

v.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

the same to the banking-house; that he has looked upon the paper writing now produced and shewn to him at this the time of his examination, marked with the letter L., and saith that the same is the statement so made out by this deponent as aforesaid, by the directions of the said Henry Lomas; and this deponent believes the same to have been shortly afterwards delivered by Henry Lomas to the complainant, Richard Stanley, for the purpose aforesaid; and from some memorandums thereon, which this deponent has no doubt are in the hand-writing of the complainant, Richard Stanley, the produced paper writing, marked L., appears to have been in the last-mentioned complainants' possession.

Charles Brookfield (who was examined before the hearing) deposed, that on the 11th of January, 1816, the complainants having a very large balance due from Fidgeon and Co., and being dissatisfied at its not being reduced, instructed this deponent, as their attorney, to take a journey to Birmingham, to endeavour to obtain a reduction of the account, and also to obtain from William Fidgeon a satisfactory security for the 10,000*l.* due upon the bond; and one of the complainants, Richard Stanley, made an affidavit of the debt upon the bond against William Fidgeon, that this deponent might immediately pursue legal proceedings if satisfactory security was not given. That he came over to Birmingham, and on the morning of the 13th day of January, 1816, he saw Edward Getley, and expressed to him the complainants' dissatisfaction at the balance of Fidgeon, Getley, and Lomas's account not being much reduced, the balance being then, as he had been informed, and believes it was

then admitted by the said Edward Getley, upwards of 20,000*l.*, and that the complainants were determined to have it reduced : that the said Edward Getley told him that they were in daily expectation of remittances from Mr. Thomas Fidgeon, who was then on the Continent ; and also that they were executing a large order for Mr. Levi, and were in expectation of having his acceptances to a large amount, which should be paid in reduction of the account : that this deponent then took a journey to Tamworth, for the purpose of seeing Mr. William Fidgeon : that he saw him there, and spoke to him on the subject of the bond he had given for Fidgeon, Getley, and Lomas to the complainants, and produced to him the said bond now produced to this deponent, marked with the letter A, and asked if the name “ Wil^m Fidgeon,” thereto subscribed, was not his signature, when he admitted that it was : that he requested the said Mr. William Fidgeon to re-execute the bond in his presence, which he did not hesitate to do ; that he, this deponent, ordered a pen and ink, and having cleansed the ink from the pen, the said William Fidgeon re-executed the bond, as stated in this deponent’s answer to the second interrogatory, by retracing his name with the pen, and afterwards sealing and delivering the bond. After some conversation, this deponent told the said William Fidgeon, that for so large an amount the parties were dissatisfied to hold merely a bond ; and understanding that he had ample freehold property, they expected the 10,000*l.* to be secured either by mortgage, or a deposit of title deeds relating to property of competent value, or that he must pay the money : that Mr. Fidgeon said he was surprised to be called

1837.

WALKER

v.


HARDMAN.

1837.

WALKER
v.
HARDMAN.

upon for payment ; that it was impossible for him then to raise so large a sum, and that he supposed that he should only be liable to his fourth part of the 10,000*l.* : that this deponent told the said William Fidgeon he was liable to pay the whole sum, and pointed out, or read over to him, that part of the bond which shewed him it was a joint and several bond : that he said he did not understand it in that way : that he this deponent then told him that his instructions were, either to have the security required, or the money : *that he told the said William Fidgeon, if he would give the complainants freehold security, they would give him any reasonable time ; and that when Fidgeon, Getley, and Lomas reduced their account, the security might be given up :* that this deponent requested the said William Fidgeon to consult his attorney, and that he might confer with this deponent, but which the said William Fidgeon then declined doing ; but the said William Fidgeon promised to consult a friend, and to meet this deponent in Birmingham the following morning ; that the said William Fidgeon met this deponent the following morning, at Mr. Thomas Fidgeon's house in Birmingham, when the said William Fidgeon told deponent that his friend advised him to sign nothing more—that he had signed enough already : that this deponent then told the said William Fidgeon, in the presence and hearing of the said Edward Getley, if he did not give security, he must immediately pay the money, or the complainants would proceed against him on the bond : that after some further conversation, the said William Fidgeon consented to give the security, and promised to bring his title deeds to this deponent to

Birmingham the following morning : And this deponent saith, that in the above statements of the conversations between him this deponent and the said William Fidgeon, he does not mean to set forth the precise words in which the said conversations were held or took place, but that the same were to the effect and full purport and meaning hereinbefore stated by him this deponent : And this deponent further saith, that he waited for the coming of the said William Fidgeon at Birmingham the following morning, and in the course of the forenoon a person whom this deponent did not know, but who, this deponent was told by Mr. Getley, to the best of this deponent's recollection and belief, was the defendant Sam. Cave Fidgeon, came and brought him the note now produced, marked with the letter B., and which is in the words following : —

1837.

 WALKER
 v.
 HARDMAN.

“ Sir, I have seen my friend, and he thinks with
 “ me, that, as the whole of my estate will not pay
 “ the amount of the bond, and consequently I
 “ should be as liable to be sent to prison then as
 “ now, I have made up my mind not to sign any
 “ thing more, or part with my title deeds, till I
 “ have seen my brother.

“ I am your's—W^m FIDGEON.”

And which note is addressed to Mr. Brookfield, Birmingham : that after the receipt of the said note marked B. he this deponent had no further communication with the said William Fidgeon personally : that he this deponent then proceeded from Birmingham to London, for the purpose of seeing Henry Lomas, one of the obligors in the bond

1837.
WALKER
v.
HARDMAN.

named, and on the 17th or 18th day of January, 1816, he saw the said Henry Lomas, and had several conversations with him, and expressed to him how much the complainants were dissatisfied that they had neither had the promised acceptances of Alexander Levi, nor any remittances from Germany, and that they were determined to have the account reduced, and told him that he had applied to Mr. William Fidgeon on the subject of the bond; and Lomas said that Thomas Fidgeon was on the Continent, and that they were going on with the order for Levi, and that he Lomas hoped speedily to reduce the debt by Levi's acceptances and remittances from the Continent: that on or about the 22nd or 23rd day of the same month of January, this deponent returned from London, and came to Birmingham, and called upon Getley, at his house at Moseley, where he received similar assurances as to the reduction of the debt due to the complainants: That in consequence of no reduction of the account of Fidgeon, Getley, and Lomas, with the complainants, having taken place, deponent, on or about the 27th of March, 1816, accompanied Mr. Richard Stanley, one of the complainants in this cause named, to Birmingham, to see Edward Getley, and to insist upon something being done to reduce the account, the balance of which was then, as this deponent was informed and believes, more than 25,000*l.*: that they saw Getley, and Richard Stanley peremptorily demanded from him that the account should be reduced, when the said Edward Getley gave bills upon Alexander Levi, or Alexander Levi and Co., (he does not recollect which,) drawn by Getley, in the firm of Henry Lomas and Co., for the amount of 10,000*l.*

to go to the credit of the general account; but which bills have not been paid, the said Alexander Levi having refused to accept the same.

These depositions, and the depositions of Mary Fidgeon, taken before the hearing, were read before the Master, and were the only evidence produced before him under the last mentioned order.

In pursuance of the order of the 19th of July, 1822, the Master made his report, bearing date the 17th of January, 1825, as follows:—

“ In pursuance of an order made in this cause on
 “ the 19th day of July, 1822, whereby, &c. I have
 “ proceeded on the said enquiry, and for that pur-
 “ pose the depositions of Charles Brookfield and
 “ Mary Fidgeon, witnesses examined on the part
 “ of the Plaintiff previously to the hearing of this
 “ cause, and the depositions of William Dyson and
 “ Richard Wood, witnesses examined on the part
 “ of the Plaintiffs, under the order of the 19th of
 “ July, 1822, and cross-examined on the part of
 “ the Defendants, have been read before me: And
 “ upon consideration of the said evidence, I find,
 “ that the bond and the condition thereof are in
 “ the common and usual form of a joint and seve-
 “ ral bond for payment of money, with lawful
 “ interest for the same from the date thereof, ex-
 “ cept that the principal is expressed in the condi-
 “ tion to be payable (with lawful interest) on
 “ demand, and not on any particular day; and I
 “ find, that William Fidgeon, one of the obligors
 “ in the bond, was a surety only for Thomas
 “ Fidgeon, Edward Getley, and Henry Lomas, the
 “ other obligors therein named, and that Thomas
 “ Fidgeon, Edward Getley, and Henry Lomas,
 “ were partners in trade, and kept an account with

1837.

WALKER
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

“ the Plaintiffs, who carried on the business of
 “ bankers in partnership ; and I find, that the
 “ bond was executed by William Fidgeon on or
 “ about the date thereof, and that such his execu-
 “ tion was attested by Mary Fidgeon, (a witness
 “ examined on the part of the Plaintiffs,) and that
 “ the bond was, on the 13th day of January, 1816,
 “ re-executed by him, and that such re-execution was
 “ witnessed by Charles Brookfield, a witness also
 “ examined on the part of the Plaintiffs ; and I
 “ find, that the said bond, executed by all the said
 “ obligors, was delivered by Henry Lomas to the
 “ Plaintiffs or one of them ; and I find, that Thomas
 “ Fidgeon, Edward Getley, and Henry Lomas,
 “ meant and intended that the said bond should be
 “ held by the Plaintiffs as a security for the general
 “ balance, which should from time to time remain
 “ due from them ; but it hath not been proved
 “ before me that William Fidgeon ever made any
 “ agreement, declaration, or acknowledgment whe-
 “ ther the said bond was to be held as a security
 “ for the particular balance due to the Plaintiffs on
 “ the banking account at the date of the bond, or
 “ for the general balance which should from time
 “ to time be due to them ; and the only evidence
 “ produced before me of the intention with which
 “ the said William Fidgeon gave the said bond, is
 “ (as I conceive) the circumstance of his having,
 “ on the application of Charles Brookfield, as
 “ attorney for the Plaintiffs, re-executed the said
 “ bond on the 13th day of January, 1816, without
 “ having made any inquiry as to the amount of
 “ the balance then due from the said Thomas
 “ Fidgeon, Edward Getley, and Henry Lomas, to
 “ the Plaintiffs, from which circumstance I pre-

“sume that the said William Fidgeon considered
 “the said bond as given by him for the general
 “balance which might from time to time be due
 “to the Plaintiffs.”

1837.
 WALKER
 v.
 HARDMAN.

The Respondents, John Hardman and Thomas Cooke, and the Defendant, Peter Kempson, took the two following exceptions to the Master's report of the 17th of January, 1825:—

1st. — “For that the Master hath in and by his
 “said report certified, that he finds that Thomas
 “Fidgeon, Edward Getley, and Henry Lomas in
 “the said report named, meant and intended that
 “the bond in the said report mentioned, should be
 “held by the Plaintiffs as a security for the general
 “balance which should from time to time remain
 “due from them; whereas the Defendants submit
 “that the said Master ought not so to have cer-
 “tified.”

2nd. — “For that the said Master hath in and
 “by his said report certified, that the only evidence
 “produced before him of the intent with which
 “William Fidgeon, gave the said bond is, the cir-
 “cumstance of his, having, on the application of
 “Charles Brookfield, as attorney for the Plaintiffs,
 “re-executed the said bond on the 13th of Janu-
 “ary, 1816, without having made any inquiry as to
 “the amount of the balance then due from Thomas
 “Fidgeon, Edward Getley, and Henry Lomas, to
 “the Plaintiffs; from which circumstance, the
 “Master, presumes that William Fidgeon consi-
 “dered the said bond as given by him for the
 “general balance which might from time to time
 “be due to the Plaintiffs; whereas the Defendants
 “contend and submit, that the Master ought not
 “so to have certified; but he ought to have certi-

1837.

WALKER
v.
HARDMAN.

“ fied that the said bond was to be held as a secu-
 “ rity for the particular balance due to the Plaintiffs
 “ on the banking account at the date of the said
 “ bond: And the said Defendants contend and
 “ submit, that the said Master ought to have in-
 “ quired and stated to the Court whether any and
 “ what sum remained due to the Plaintiffs on such
 “ bond, from the estate of the said William Fid-
 “ geon.”

The Appellants, and the Plaintiff, Thomas Walker, also took the three following exceptions to the Master's Report of the 17th day of January 1825 : —

1st. “ For that the said Master hath not, in and
 “ by his said Report, certified as special circum-
 “ stances, that the Plaintiffs understood the bond
 “ dated the 26th day of August, 1815, in the
 “ pleadings mentioned to have been given to them
 “ as a security for the general balance which
 “ should from time to time remain due to them,
 “ and that such was the agreement between them
 “ and Henry Lomas, Thomas Fidgeon, and Ed-
 “ ward Getley, who then carried on business in
 “ partnership, under the firm of Henry Lomas and
 “ Co.; whereas the said Master ought to have cer-
 “ tified such facts as special circumstances, having
 “ been requested so to do on behalf of the said
 “ Plaintiffs.”

2nd. “ For that the said Master hath not, in
 “ and by his said report, certified as special cir-
 “ cumstances, that the bond was given in lieu of
 “ another bond in the penal sum of 10,000*l.*, which
 “ had been previously given by the same parties
 “ for securing the balance of the banking account
 “ of the said Henry Lomas and Co. with the said

1837.

WALKER

v.

HARDMAN.

Plaintiffs, to the extent of 5000*l.*; and that, previously to the execution of the said bond of the 26th of August, 1815, the said Henry Lomas and Co. had applied to the said Plaintiffs for further advances, and that the said Plaintiffs had refused to extend their advances to the said Henry Lomas and Co., without further security: And that the penalty in the said bond of the 26th of August, 1815, was made 20,000*l.* instead of 10,000*l.*, and that the money thereby secured was made 10,000*l.* instead of 5000*l.*, in order to induce the said Plaintiffs to make further advances to the said Henry Lomas and Co., and that on the occasion of the execution of the said bond, the said Henry Lomas delivered to the said complainants a list of the advances, amounting to 12,000*l.*, which the said Henry Lomas and Co. should have occasion for from the said Plaintiffs in the course of the ensuing month: And that the said complainants actually made such advances on the security of the said last named bond; whereas the said Master ought to have certified such facts as special circumstances, having been requested so to do on behalf of the said Plaintiffs."

3d. "For that the said Master hath not, in and by his said Report, certified, as special circumstances, the several facts deposed to by William Dyson, in answer to the 12th and 13th interrogatories, exhibited before the Master for his examination, and by Richard Wood, in answer to the 11th and 12th interrogatories, settled by the Master for his examination as connected with the giving of the said bond, and forming part of the same transaction; whereas the said

1837.

WALKER /
v.
HARDMAN.

“ Master ought to have certified such facts as
“ special circumstances, having been requested s
“ to do on behalf of the said Plaintiffs.”

The Exceptions taken by the Respondents having been argued before the Vice-Chancellor, on the 12th of December, 1826*, his Honor made an order, whereby he held the 1st exception to be insufficient, and therefore ordered that the same

* The Vice-Chancellor, after hearing counsel in this case, delivered the following judgment: —

The first question here is, what is the legal effect of this bond; does this bond at law import an obligation for the payment of a present debt, or the payment of any floating balance, that may accrue between the parties? There are two expressions, which are quite decisive upon the subject. In the first place, the bond is payable upon demand, that imports a present debt, because the demand might be made the day after the execution of the bond; and therefore it is clear that this bond was for a present debt existing at the time of the execution of the bond: and there is no doubt that was the clear understanding of the Court at the time when the reference was made; unless the Court had been of that opinion, by no possibility could such a reference have been made to the Master. The reference is in these terms:—The Master is required to state to the Court whether the bond, dated the 26th of August, 1815, was to be held as a security for the particular balance due to the Plaintiff on the banking account at the date of the said bond, or for the general balance which should from time to time remain due to him. Now, if upon the face of the bond, it imported to be a security for a general balance, the Court would not have sent such an inquiry; that inquiry must have been, from the clear legal opinion of the Court, that it was a bond, on the face of it importing the payment of a present debt. The Master, upon that inquiry, has reported with respect to the three principal debtors in partnership, that it was understood by them that the bond for 10,000*l.* should stand as security for any floating balance that might be due from them to the obligee; but that with respect to Mr. Fidgeon, the surety whose estate is sought to be charged by this suit, the Master expressly finds there is no evidence to import an intention on

should be over-ruled. And his Honor held the 2d exception to be good and sufficient, and therefore ordered that the same should be allowed.

The three exceptions taken by the Appellants, were argued before the Vice-Chancellor at the same time; and thereupon an order was made

1837.

WALKER

D.

HARDMAN.

his part to this effect, except that he had re-executed the bond (which the Master finds), after the original execution of it; and the Master, from that circumstance, presumes that Mr. Fidgeon had re-executed the bond without inquiring whether the debt was paid, considering that it should stand as a subsisting security for the general balance. When the evidence before the Master is considered, no such presumption arises out of the case; and the circumstance of the re-execution of the bond cannot have the effect of raising such a presumption, as the Master has concluded his report, by stating—"I am clearly of opinion that, by the legal effect of the bond, it is a security for a present debt." And it differs materially from those cases which have been referred to. The Judges there founded their opinion upon the circumstance on the face of the instrument—that it did not profess to be a security for a present debt; that was the ground stated by the Judges in the cases read at the bar. Being, therefore, of the opinion which I have stated, I must say I am rather surprised I should have sent it to a reference: if I accurately saw what the case was, I should not have been justified in sending it to a reference; and I must either not have known what the terms of the security were, or it could not have been properly discussed at the bar, and the real question brought before me. Having stated my opinion upon the legal effect of the bond, I think I should not be warranted in sending this question to a court of law; therefore I must allow the second exception, and overrule the first. At law, the effect of the bond for a present debt cannot be extended; but if there is some collateral agreement that the bond should be a security for any future floating balance, a court of equity will sustain the collateral agreement; which does not contradict the bond, but gives to the agreement in the bond an extension which at law it does not import.

Against this judgment there was an appeal to the Lord Chancellor (Brougham). The appeal was heard in January, 1831, and dismissed, upon hearing the Appellants' counsel.

1837.

WALKER
v.
HARDMAN.

whereby he held that the said exceptions were *insufficient*, and it was ordered that the same should be overruled.

Against the order of the 19th day of July, 1822, and the two several orders of the 12th day of December, 1826, there was a petition of rehearing, and appeal to the Lord Chancellor.

Before the petition came on to be heard, the Defendant, Sam Cave Fidgeon, died, and after his death, letters of administration of William Fidgeon's estate and effects, left unadministered by Sam Cave Fidgeon, were granted to the Respondent, Ann, the wife of the Respondent Charles Baylis; and letters of administration of the goods and chattels of Sam Cave Fidgeon were granted to the Respondent Sophia, the wife of the Respondent William Baker; and thereupon the suit was in the usual way revived, by an order bearing date the 29th day of January, 1828.

The petition of rehearing and appeal came on to be heard before the then Lord High Chancellor, the Right Honourable Lord Lyndhurst, on the 8th and 10th days of July, 1830, and his Lordship took time to consider of his judgment; but his Lordship went out of office before he had delivered his judgment thereupon.

On the 14th day of January, 1831, the petition of rehearing and appeal, was heard before Lord Brougham, and dismissed, with costs.

After the last mentioned order, the late Plaintiff, Thomas Walker, died, but the whole of his interest in the suit survived to the Appellants; Peter Kempson also died, but the whole of his interest in the said suit survived to the Respondents, John Hardman and Thomas Cooke.

The appeal was against the order of the 14th day of January, 1831, and the several orders or parts of orders thereby affirmed, and bearing date respectively the 19th day of July, 1822, the 12th day of December, 1826, and the 12th day of December, 1826.

1837.
WALKER
v.
HARDMAN.

For the Appellants Sir *F. Pollock* and Mr. *Wigram*.

The order of the 19th of July, 1822, is erroneous.

It ought to have overruled the exceptions taken by the Defendants to the Master's report of the 16th of July, 1821. The 1st exception should have been overruled, because there was no evidence of any sum of money having been received by the Plaintiffs, or any person for their use on account of the bond. The 2nd exception ought to have been overruled, because there was no evidence before the Master that the bond was given to secure such balance as was due at the time the bond was given, or so much thereof as did not exceed the sum of 10,000*l.*; and the only evidence laid before the Master, according to its fair construction, showed, that the bond was given to the Plaintiffs to secure the general or floating balance of the banking account of Henry Lomas and Co. with them. The 3d exception ought to have been overruled, because, in the absence of all evidence, the Master could do no otherwise than report, as he has reported, viz. :—That nothing had been received by the Plaintiffs on account of the bond; and the only evidence before him was an examination of the Plaintiffs, which confirmed that conclusion. The 4th exception ought to have

1837.

WALKER
v
HARDMAN.

been overruled for the same reasons as the former exceptions, and also as depending thereupon.

The inquiry directed by the order of the 19th of July, 1822, ought not to have been directed because the only inquiry which, consistently with the principles and practice of the Court, ought to have been directed, was the inquiry which had been previously directed by the decree of the 31st of July, 1819, viz.:—Whether any and what sum or sums of money had been received by the Plaintiffs, or by any other person or persons, for their or either of their use, on account of the bond?

The order of the 12th of December, 1826, made upon the argument of the Defendants' exceptions to the Master's report of the 17th of January, 1825, will, if the order of the 19th of July, 1822, is reversed or varied, be reversed or annulled as consequential thereupon; and if the order of the 19th of July, 1822, is affirmed, still so much of the order as allows the 2nd exception taken by the Defendants to the Master's report of the 17th of January, 1825, is erroneous, because the result of the evidence referred to by the Master in his report, as read before him, is, that the bond was to be held, not as a security for any particular balance due to the Plaintiffs on the banking account at the date of the bond, but for the general or floating balance which might, from time to time, be due to them on such account; and the Court did, in fact, by overruling the 1st exception, decide that such was the purpose for which Thomas Fidgeon, Edward Getley, and Henry Lomas, (the principal obligors) meant and intended that the bond should be held: so that the allowing of the 2nd exception is inconsistent with the overruling of the 1st ex-

ception; and the order is inconsistent with itself, in deciding that the bond was to be held as a security for a different purpose from that for which three of the obligors intended it should be held.

This is, in its nature, purely a question at law. The death of William Fidgeon is the only reason why the proceedings found their way into a court of equity, otherwise the obvious course to adopt on the part of the bankers would have been to sue William Fidgeon at law on that bond; there was a reference to the Master in that suit, in equity, and then the meaning of the bond came in question, whether the bond was given for the specific balance owing at the time of the date of the bond, or whether it was given as a collateral security for any sum of money that might be due on the general account.

The objection was not taken by the answer or at the hearing. It arose first before the Master.

There are several cases which throw light on the subject, which we shall presently bring under your Lordships' notice; that really is the single question, whether, when there is a running account between bankers and a customer, and a simple bond is given without any recital, but merely with a condition to secure the payment of a sum of 10,000*l.*, with lawful interest, from the date of the bond, what is to be considered the construction of that bond?

In examining this, which is a legal and not an equitable question, the simplest mode of considering what the liabilities of the obligor would be, and what the rights of the obligee would be, is to see what would be the effect of putting in suit that bond in a court of common law. What is

1837.

WALKER
v.
HARDMAN.

1837.

WALKER
&
HARDMAN.

the effect of the bond at law? It is an admission that a sum of 10,000*l.* is payable, with lawful interest, from the obligor to the obligee, and it becomes incumbent on the obligors to show that they have paid that sum, or that there is some reason why they should not pay it. That such a security may be a security for a general balance will be clear from the authorities which we shall cite, and in order to show that the debt which, upon the face of the bond is due at law, is not due, it is incumbent, on those who seek to discharge themselves, to make out what was the debt for which that bond was given, and that such debt has been discharged.

The facts, which appear to be important, are these, what was the relative state of the parties when the bond was given? There was a banking account; on the credit side of that account the bankers entered all sums of money which they received, and all securities, that is, all bills or promissory notes, of every sort, they entered generally; all of them to the credit of the customer, leaving the interest to be calculated at the end of the year: on the other side the customer was debited with all sums drawn out, with all bills and securities with which they were furnished, and at the end of the year an interest-account was made up, and the account was to be balanced, and the balance carried to the commencement of the next year. Upon such a dealing what would be the natural conclusion as to the object for which that bond was given, supposing you are merely to look at the circumstances of the parties, the fact of the bond being given, and the advances made by the banker to the customers? At the time

when this bond was given the payments in and the payments out of the account, in respect of which, in some shape or other, the bond was given, amounted to no less than 10,000*l.* a month. At the time the bond was given there was no specific ascertained balance actually due. You could get at what might be called the cash balance by throwing all the bills out of the account on each side, and ascertaining what was the actual money advanced by the bankers to the customer; in point of fact, that was 2,300*l.*, but there were bills running, to a very considerable amount, on both sides, and the real debt between the parties, if that expression be used without any particular reference to items, could only be ascertained by waiting till all the bills had run out, and then ascertaining to what extent they had become available or not.

There is no evidence whatever that the bond was given in reference to the particular state of the account; the only evidence on the subject is, that the customer required from the banker an advance, and an application having been made for indulgence and accommodation on the account, that was refused unless further security was given: there had been a bond, for a smaller sum, a very short time before, and on this expected further advance this latter bond for 10,000*l.*, was given, and the question is, was that bond given for the particular specific balance that was due at the moment, or was it given upon the general account, and for the purpose of protecting the bankers, from time to time, on that running account? If the proceeding had taken a legal shape it would have been incumbent on the obligors to show to what that bond applied, so as to satisfy any Court,

1897.



WALKER

v.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

before whom the question might have arisen, that the bond applied to a particular sum, and that such sum was discharged. *Prima facie* the sum secured by the bond was due, and it is incumbent on those who say it is discharged to prove that the fact is so.

In the case of *Exparte Langston** an expression fell from Lord Chancellor *Eldon*, that, with respect to an equitable mortgage, if it has been given on a specific advance, and further advances are afterwards made, it is to be inferred those advances were made on the same security, for his Lordship says, “It is not probable that a person having made an advance on security, should make a further advance without security.” But it is to be contended, on the other side, that this bond for 10,000*l.* was paid and discharged by the first 10,000*l.* that happened to come into the credit side of the account. Is it likely the bankers, who required security in respect of advances which they periodically make to a customer, would be satisfied with that security merely for the short period of one month, and then go on, from month to month, making advances, without requiring any further security? Nothing can be more absurd than to suppose that a banker would take such a security.

In the case of *Woolley and Jennings*†, a warrant of attorney had been given for 4000*l.*, and the defeazance was in these words. “The within warrant of attorney is given to secure the payment of the sum of 4000*l.* with lawful interest thereon.” It appeared that the security was given on the 20th January, 1823, and on the 4th

* 17 Vesey, 227.

† 5 Barn. & Cress. 165.

October in the same year it was put in force, and certain property was taken under it. “ Between “ the 20th January and the 4th October, 1823, “ the bankrupts in the course of their dealings “ with the Defendants had paid into their hands a “ larger sum than 4000*l.*, and it was thereupon “ contended that the warrant of attorney was dis- “ charged :” but the Chief Justice was of a different opinion, and the Jury found a verdict for the Defendants. The Attorney-General moved for a rule *nisi* for a new trial. The sum secured by the warrant of attorney (as he argued) was paid off before judgment was entered up. Sums amounting in the whole to much more than 4000*l.* were paid by the bankrupts into the hands of the Defendants, between the 20th of January and the 4th of October. There was a running account between them; the monies paid in were therefore applied to the first items of the account, nothing to the contrary having been said when the money was paid. In such case, the party receiving the money had no right to appropriate it to the discharge of any particular items; Clayton’s case, *Bodenham v. Purchase*. If no warrant of attorney had been given, it is clear that the payments would have been considered applicable to the first items of the account; and it seems difficult to understand how that should be altered by giving a collateral security. But the Court observed, “ In *Kirby v. The Duke of Marl-* “ *borough*, Lord Ellenborough said, ‘ This is a bond “ ‘ given by the surety, as an indemnity for advances “ ‘ to a definite amount; it is the same as if the “ ‘ surety had expressed that the bankers might “ ‘ lend to the amount of 3000*l.*; and when the “ ‘ advance was made to that amount, the guarantee

1837.

 WALKER,
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

“ ‘ became *functus officio*, and was not a continuing
 “ ‘ guarantee.’ This case is very different ; there
 “ is nothing on the face of the warrant of attorney
 “ or the defeasance to show that it was intended to
 “ secure the balance existing at the time when it was
 “ given. In the absence of any thing to show such
 “ an intention, it must be construed as a continuing
 “ security.” If you substitute the warrant of attorney
 for the bond, the two cases are in principle identical—
 There is nothing to show that this sum of 10,000£
 was the specific sum that was at that time due ; if
 it is possible to discover what was the specific sum,
 and if Lord Eldon’s judgment be law, the conclu-
 sion is, that if nothing appears to the contrary,
 then it was a continuing guarantee, and then cer-
 tainly the Appellants are entitled to your Lord-
 ship’s judgment.

The case of *Pease v. Hirst* *, was an action on a promissory note bearing date the 6th of January, 1817, whereby the Defendants jointly and severally promised to pay on demand Messrs. Pease, Harrison, and Co., or order, 300£, with lawful interest for the same, value received. Plea the general issue and statute of limitations. At the trial it appeared that the Plaintiffs and R. Harrison, in January, 1817, carried on business at Kingston-upon-Hull, under the firm of Pease, Harrison, and Company; the Defendant, Jonathan Hirst, had for some years before kept an account with them as his bankers, and at that time, in order to obtain credit with them, he prevailed with the other Defendants to join him in the promissory note in question. The note was deposited with the bankers, and they gave him credit for 300£ on account of it in his pass-book, and charged him

* 10 Barn. & Cress., 122.

interest for the same yearly. The circumstance of 300*l.* actually finding its way into the account as an item of credit, would very naturally lead to the introduction of an argument founded on Clayton's case, *Bodenham v. Purchas*, *Simpson v. Ingham*, and other cases of that sort. But on a rule *nisi* having been obtained in order to enter a nonsuit, (the Judge who tried the case having directed a verdict for the Plaintiff) the Attorney-General showed cause, and the judgment was given by Mr. Justice Bayley and Mr. Justice Littledale, the Lord Chief Justice being absent from indisposition, and the other Judge having been counsel in the case. Mr. Justice Bayley says this: "It seems to me the
 " Plaintiffs are entitled to retain their verdict. One
 " objection is, that as to the liability being affected
 " by the change of the firm," &c. (which is not material to the present point.) "Another objection is,
 " that this note was discharged by a balance belonging to Jonathan Hirst, which afterwards came into
 " the hands of the bankers. It was contended that
 " the Plaintiffs are bound to consider the debt due
 " on the note as paid and wiped off by that balance;
 " it does not appear to me that that was a cash
 " balance, but if it had been, the bankers would not
 " have been bound to apply it in payment of the
 " note. It would be directly contrary to the intention for which the note was given, that it
 " should be paid off by the first money of Jonathan
 " Hirst, which came to the hands of the bankers.
 " If the persons who were in substance though not
 " in form sureties had desired the bankers so to
 " apply the balance, they perhaps would have been
 " bound so to apply it." Mr. Justice Littledale says, "The next question is, has the note been

1837.

WALKER
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

“ paid off by the bankers having struck a balance
 “ which was in favour of Jonathan Hirst? It was
 “ evidently not intended by the parties to consider
 “ it as satisfied as soon as there should be a balance
 “ of 300*l*. in the hands of the bankers. It was in-
 “ tended to be a continuing security for advances
 “ to be made from time to time; it is made pay-
 “ able to order on demand; there clearly therefore
 “ was no legal obligation on the bankers to appro-
 “ priate that balance to the discharge of the note,
 “ and there having been no appropriation by the
 “ debtor, I think the debt cannot be considered as
 “ discharged.” Applying that case to the present,
 the bankers not only had no direction to apply any
 balance in satisfaction of this bond; but it would
 have been a breach of good faith, unless there was
 some special reason, since it might have caused the
 insolvency of the house. No person gives a bond
 and obtains advances from bankers on that sort of
 security, where there is a running account extending
 over many months, with a view that the moment
 funds come in, they should be applied to the satis-
 faction of the security.

The case of *Hargreave v. Smee**, was a question
 not of suretyship like this on an instrument for a
 certain sum, but was a question of guarantee;
 which was in these words. “ I agree to guarantee
 “ the payment of goods to be delivered in umbrel-
 “ las and parasols to John and Edward Augustus
 “ Smee, at No. 38, Milk Street, Cheapside, London,
 “ according to the custom of their trading with
 “ you, in the sum of 200*l*.” Goods to more than
 the amount of 200*l*. had been delivered and paid
 for, and the question was whether this was a con-
 tinuing guarantee. Lord Chief Justice Tindal

* 6 Bingham, 244.

says, "The question is, what is the fair import to be
" collected from the language used in this gua-
" rantee? The words employed are the words of
" the Defendant in this cause, and there is no
" reason for putting on a guarantee a construction
" different from that which the Court puts on any
" other instrument. With regard to other instru-
" ments the rule is, that if the party executing
" them leaves any thing ambiguous in his expres-
" sions, such ambiguity must be taken most strongly
" against himself. From the present agreement I
" collect that there were two parties already in a
" course of dealing. When the Defendant goes to
" guarantee the payment of goods to be delivered
" according to their custom of trading, I cannot
" but imply that, by some preceding dealing, (and
" I am confirmed in this by the finding of the
" jury,) the custom of the parties was to make up
" certain monthly accounts; I collect thence an
" intention that this course of dealing should con-
" tinue, which would render the guarantee a con-
" tinuing guarantee. If we were to put on it the
" limited construction which has been contended
" for, we should deprive the party of the benefit
" which appears to have been contemplated. If
" one supply of goods to the extent of 200%. would
" satisfy the stipulation in dispute; there is no
" course of trading to which the words 'course of
" 'trading' could be applied. The cases on this
" subject run so nearly into each other, that it is
" difficult to reconcile them; but the distinction
" between this case and *Melville v. Hayden*, is,
" that here the Defendant meant to keep two
" persons engaged in trade, in their established
" custom of trade. The verdict must be entered
" for the Plaintiff." In this opinion the rest of

1897.

WALKER
v.
HARDMAN.

1837.
WALKER
v.
HARDMAN.

the Court concurred, Mr. Justice Gaselee expressing some difficulty on the subject; but on the whole concurring with the Court in the decision which was pronounced.

The rules to be collected from the authorities on this subject, are first, that you are not to presume if a person makes advances on security, that he will afterwards make advances on no security; secondly, that where a bond, or warrant of attorney, is given upon a running account, if there is nothing to confine it, the presumption is, that it is given as a continuing guarantee, and that although a bill of exchange should subsequently appear at the credit side of the account and apparently be mixed up with other funds, so that you might apply to it the rule of Clayton's case, it is an available security until it is actually discharged; and lastly, that an instrument of that sort is to be taken most strongly against the person who makes it. The result of this would be, that looking at the situation of the parties, the language of the instrument, and the legal liability created by it, there being no inquiry about the particular balance, there being no account at that moment rendered, the situation of the parties being such that the account did not easily admit of its being done if asked for; it is impossible to come to any other conclusion than this, that the bond was given in order that by that means the debt might be acknowledged, and the party, the obligee, might have the means of enforcing through that bond the payment of the sum of 10,000*l.* with interest from the date, and it would be for the Defendants to show that it specifically applied to some particular sum actually paid off; failing that, the bond at law would have been

available and might have been put in force against those persons who are now represented by the Respondents.

What is it that is said on the other side, and what are the cases which will be cited as throwing a doubt on this case? The first is a case I have already mentioned as having been cited by Lord Ellenborough in his judgment in the case of *Woolley v. Jennings*. On the other side *Kirby v. The Duke of Marlborough** will be cited; there the bond was construed by the Court to mean not a continuing guarantee, but a simple security for one sum and no more; but the recital in that bond proves what was the intention of the parties, and that it had reference to that single advance; the action is by *Kirby* and *others* against the *Duke of Marlborough* and *Coburn*, and the recital is that Coburn “having occasion for divers sums of money, “not exceeding in the whole the sum of 3000*l.*, “he applied to the Plaintiffs to advance that sum “at such times and in such parts and proportions “as he might require.” Can any expression more particularly and distinctly refer to the advance of one single sum of 3000*l.*; but at such times and in such parts and proportions as the exigencies of the parties might require? “Which they had agreed “to advance on the Duke’s entering into the obligation jointly with Coburn, (to which the Duke “at the request of Coburn had consented). It “was therefore conditioned for the payment by “Coburn and the Duke, or either of them, their or “either of their heirs, executors, or administrators, “unto the Plaintiffs, their executors, administrators, “or assigns, of all such sum or sums of money “not exceeding the sum of 3000*l.* with lawful in-

1837.



WALKER

v.

HARDMAN.

* 2 Maule & Selwyn, 18.

1837.

WALKER
v.
HARDMAN.

“terest, which should or might at any time ~~be~~
“times thereafter be advanced, and lent by ~~the~~
“Plaintiffs to Coburn, or paid to his use by ~~his~~
“order and direction.” The Court held, ~~that~~
under the terms of that bond, if the 3000*l.* ~~was~~
advanced, and if a part of it was repaid, it ~~could~~
not be lent over again, and the recital which pre-
cedes the condition plainly proves that nothing
was contemplated, but one single advance of a par-
ticular sum, which might be in different sums, and
different proportions, and at different times, but
not having the character of a continuing guarantee;
nor does it appear, that the exigencies of the par-
ties, or the nature of the business carried on, or of
the dealings intended to be protected by the secu-
rity were such as to require that continuing gua-
rantee. Some stress has been laid on the words
“on demand,” that the bond is payable on
demand. So it would be, although a continuing
guarantee, if it was intended to give to the cre-
ditor whose debt was secured the means of im-
mediately putting it in force. If he saw that the
affairs of the customer whose account was to be
protected by the bond, were getting into a state,
that it made it necessary for him immediately to
resort to the protection which the security would
give him, nor does the fact that the bond is payable
on demand show that it was to protect a particular
rather than a general balance. But it is made pay-
able with interest from the date; how does that
tend to show that it was to protect one balance
rather than another? If it had been given to pro-
tect a particular balance, it would rather have given
the amount of the particular balance, and the in-
terest due upon it from the time when the interest
began to run. The circumstance of its being made

payable with interest from the date of the bond, merely shows that it was intended that the security should carry interest, and there being no other particular period from which the interest could be made to run, no other date that could be put in with any propriety, they took it at once from the date of the bond; why may not that be intended to cover a general balance upon the account which would be running in some shape or other? Being about to open an account with the Sheffield bankers, the members of the firm of Lomas and Company, together with William Fidgeon, as their surety, gave this bond conditioned for the payment of 10,000*l.* immediately, with interest from the date of the bond; what would be the construction of that bond? Inasmuch as at that moment there could be no balance due, some other construction must be put upon it than the supposition of an existing balance, it must be some prospective, some future advance to be made limited to the extent of the security. The case supposed is precisely the case before your Lordships, because the cash balance at that moment did not certainly exceed 2300*l.*; but then it may be said, granted that in the case of a bond given before the account was opened at all, it must therefore mean some future advance to be made, but it shall mean only the first 10,000*l.* that might be advanced, and it shall not apply to any other sum, and that 10,000*l.* shall be wiped off by the first 10,000*l.* to be paid in. Can any proposition as a matter of fact be more monstrous or absurd, than to suppose a man who intended to open an account with a banker, would be at the expence of a bond, or that a banker would accept such an instrument as a security, that it should

1897.


WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

cover the one 10,000*l.* advanced on one side, ~~and~~ to be wiped off by the next 10,000*l.* that might be paid in, and which according to the course of dealing between these parties would only take a month to do? What would have been the course of dealing, supposing the construction which is to be contended for on the other side as to this bond is the just one? Why the parties must have a new bond every month; a reasonable construction must be put on every such instrument as this, and according to the intent of the parties, and as funds were coming in, and being paid out to the extent of 20,000*l.* every month, upon an average, is it not a strange conclusion to come to, that this bond so worded and so given, was merely intended to protect the existing balance between the parties at the time when the bond was given, and beyond that it has no operation; that as soon as ever funds came in, they were not to be applied to the exigencies of the account, they are not to be applied to pay checks to satisfy bills for the use of the party in the course of his business; but they are to be immediately applied in satisfaction of this bond? In other words, the bond is to be of no use whatever, for it would contribute nothing to the funds, or the advantages, or the interest of the party for whose benefit or in whose favour it was given, for if that is the right construction and meaning of the transaction, it is quite plain that the account must be stopped immediately.

As to the doctrine of Clayton's case, *Bodenham v. Purchas*, *Simpson v. Ingham*, and other cases of that sort, which have been urged elsewhere, and which decided that wherever there is an account with items of debit on one side, and credit on

the other, if there be no specific appropriation, the earlier credit must be applied to the earlier debits and the account must be satisfied, and the items discharged as it were, and wiped off in the order in which they stand, in point of time, in the account; that is perfectly true, wherever the doctrine is applicable, but the case is different where there is a collateral security; the doctrine of Clayton's case and *Bodenham v. Purchas*, and *Simpson v. Ingham*, has nothing to do with a question such as this, arising upon the intent and meaning of a collateral security: even in the case of *Pease v. Hirst*, although the 300*l.* entered into the account, yet, as there was a promissory note taken as a collateral security, the Court held that the 300*l.* was not discharged. Why? Because it did not stand singly as an item in the account to be wiped off, but was intended as a collateral security.

Here Clayton's case, and the other cases of that class, can have no application, the 10,000*l.* never got into the account at all. The result of all those cases, the doctrine of wiping off the earlier debit by the earlier credit, does not apply to a case where the sum secured does not come into the account at all; it does not apply to such a case of a collateral security, it only applies to the case where a debit comes into the account; there is no collateral security to give a further demand on any other party.

Lord Lyndhurst. Clayton's case would apply to the collateral security in this case, if it were clear it was only intended as a cover for the first 10,000*l.*

For the Appellant. Certainly, the debit being paid, the collateral security would be satisfied.

1837.

WALKER
&
HARDMAN.

1837.

WALKER
v.
HARDMAN.

No doubt, if it were a single transaction; suppose a banker is applied to, to discount a particular bill, and he discounts the bill, and, according to the practice which has obtained here, immediately gives credit for the full amount of the bill, intending, at the end of the year, to charge interest for the whole of the time. If, doubting the validity of that bill, he requires that another promissory note, of another person, should be given as a collateral security for the payment of that bill, there can be no doubt the collateral security, so given, would be discharged if the account was allowed to run on, and that first bill was dishonoured when it became due, and carried to the debit side of the account, and then afterwards funds came in which satisfied that item in the account so carried to the debit side of the account; that item being paid off, and consequently satisfied, the collateral security for the payment of that bill might be considered as at an end; but that is not the way in which a banker would treat the case. Having a collateral security he would not pass that bill to the debit side of the account, or if he did it would be in such a form as to retain the security on the collateral note, and there are instances which have occurred in one or two cases which are reported, where that sort of practice obtained. If, then, there be nothing in the language of this bond that leads to any conclusion that it was intended to cover the specific balance due at that time, and if there be nothing in Clayton's case, and the other similar cases, which show that the first 10,000*l.* must be wiped off, what is the immediate conclusion? That the debt remains unsatisfied; that that bond has never been

paid, and the parties, the obligees in the bond, are now entitled to stand on their claim against the estate of William Fidgeon, the security for the amount of the bond and the interest due upon it. Suppose it had not been necessary to resort to a court of equity, and suppose William Fidgeon was still alive and that he was sued upon this bond, upon whom would the *onus* rest to show that the whole of the bond was applicable, and whether the sum, to which it was applicable, was paid or not? Clearly not on the obligee of the bond. He has only to say, "there is your hand and seal to an acknowledgment that you owe me 10,000*l.* and interest, payable from the date of that bond." The bond contains nothing more than a sort of covenant that the sum of 10,000*l.*, with interest, shall be paid to the obligee, and it may be admitted that the obligor has a right to give evidence of every matter that can tend to throw light on the question, whether the bond was given for the specific debt or the general balance, but the *onus* of explanation and proof is cast on the party who seeks to get rid of the effect of a legal instrument, which, on the face of it, creates a debt of 10,000*l.*, due, with interest, from a certain date; and what is the course that would have been taken at law? It would have been incumbent on William Fidgeon to have stated on the record, by way of plea, that that bond was given to secure a balance not exceeding 10,000*l.* existing at that moment, and then he would have pleaded the ground of the doctrine in Clayton's case, that that had been paid by subsequent items on the credit side of the account. The Plaintiff would have replied, that a bond was not given for a specific balance, and then it would

1887.


WALKER
v.
HARDMAN.

1837.

WALKER

v.

HARDMAN.


have been incumbent on the Defendant to prove the affirmative of that issue, that the bond was given for a specific balance, and that would have been a question of fact for a jury to try under all the circumstances of the case. There was a banking account, and sums paid in and drawn out every day, to the extent of 20,000*l.* paid in and drawn out in the course of a month. There were no means of ascertaining what was the specific state of the account at any time; and, if it were ascertained, what evidence is there that the bond had any reference at all to it, or who can suppose the parties ever intended, when their debits and their credits for a continuance were based on the footing of this bond, that the first 10,000*l.* which would come in, according to the course of dealing, within a fortnight, was intended to satisfy the bond?

The Master found that this bond was given by William Fidgeon for the general balance of the account, and certainly he assigned an inconclusive reason for that conclusion; a reason which, although it is not without any force at all, is hardly adequate to lead of itself to that conclusion: it is this, that the signature and execution of William Fidgeon was attested by some near relation of William Fidgeon's, and it being considered desirable that the obligees of the bond should not be, in any degree, in the hands of a witness who might be disposed to favour William Fidgeon, his near relative, with a very proper caution desired to have the bond re-executed in the presence of a witness perfectly impartial; or, at all events, certainly not the mere relative of and disposed to favour the obligor: application, on this account, having been

made to William Fidgeon to re-execute the bond, in the month of January, 1815, five months after the original execution of the bond by him, he re-executed it in the presence of another witness; and the Master thought and found that that was evidence, that it was intended to be a bond for a general balance, and the reasoning appears to be this: if William Fidgeon executed the bond again in January without asking whether the balance was altered, or what was then the state of the balance; if he knew any thing of the nature of the account, and the bond was intended to secure a particular balance, he must have known that it was for a particular balance, which must have been paid over and over again, between August, 1814, and January, 1815. The Master, therefore, said, that, in his judgment, this was evidence, and, I believe, it was the only evidence before him, in his view of the case, to prove that the bond was for the general balance, the only evidence against William Fidgeon, omitting the far more important and weighty evidence resulting from the state and dealings of the parties; if William Fidgeon knew any thing about the matter he must have known that unless it was a security for the general balance, something different from a specific balance due at the moment, it was of no use whatever, for, as the account was kept, if it had been incumbent on the bankers immediately to treat it as a security for the particular balance only, they must almost instantly, as soon as they received the bond, have stopped the account, in order to pay off the 10,000*l.*; in other words, that security, instead of enabling them to go on (the purpose for which it was given), would have had the effect of stopping the account

1837.


WALKER
v.
HARDMAN.

1837.

 WALKER
 v.
 HARDMAN.


altogether. The Master came certainly to a conclusion on a fact by which it was hardly warranted. The Master might have come to a conclusion on erroneous grounds. But it does not follow that the conclusion itself was erroneous. The question was heard by the Lord Chancellor, but only on one side, and appears to have been decided on the ground, that it was incumbent on the Appellant to give evidence, which properly belonged to the other side, to prove that this legally sealed instrument, purporting to be a security for 10,000*l.*, has been paid off.

The defence of the personal representatives of William Fidgeon, against the claim upon the bond, was, that he was intoxicated at the time of its execution. No other ground of defence was taken, and that was not sustained. The bond in a court of law constitutes a debt; not the penalty but the sum specified in the condition, and it is agreed, that it is for some collateral purpose of security. The question is what is that purpose. The Appellant says, to secure a floating balance, the Respondent says, to secure the balance due at the date of the bond, this is purely a question of law. The accident of the death of the only solvent obligor brought the question into equity.

If the question had been tried at law in an action upon the bond, as soon as proof had been given of the execution, the burden of reducing the debt would have rested upon the Defendant. The enquiry before the Master should have taken the same course.

William Dyson proves the mode of dealing between the parties, which is important in the absence of other evidence. It is material to see whether

at the date of the bond there is any particular balance to which it can be referred. Bills paid in by the customer were carried to his credit as cash. It was a mixed account of cash and bills; could the bankers have held their customers to bail on a balance excluding the bills? According to this mode of dealing there was only a balance of 2300*l.* due to the bankers at the date of the bond. As against the principals in the bond it is admitted, that it must be considered as a continuing security.

1837.

 WALKER
 v.
 HARDMAN.

What ground is there for a distinction as to the surety. There must have been a communication between the parties, and the surety ought to have enquired into the nature of the obligation which he voluntarily incurred. According to the evidence of Dyson, the customers expressly contemplated a security for future advances. William Fidgeon made no inquiry, which is what distinguishes his case from that of the others. It is in evidence, that application was made to the principals to give security for the general balance: this is proved by Richard Wood. If a joint action had been brought on the bond against the four, they must have discharged themselves by showing that it was given for a particular balance which was paid off. If there was any distinction of the surety from the principals it was for them to show it.

The case was decided by the Vice-Chancellor on the ground that interest was reserved.

Lord Lyndhurst.—That would apply to the principals as well as the surety. If the principals state what the object of the bond is, and the surety executes without inquiry, does he not adopt the statement and intention?

1897.

WALKER
v.
HARDMAN.

For the Appellants.

It is at least evidence to go to a jury; if he executes without inquiry, he adopts the object and purpose of the security as settled by the principals. How can it be incumbent on the party secured to show communication of the purpose by the principal to the surety?

The decisions turn upon the mode of dealing between the parties, *Atwood v. Crowdie**, and their object in giving the security. When there is a running account and a security given for a general sum, that must be considered as a security for a general balance. As to the security including interest, that was so in *Woolley v. Jennings* and *Prase v. Hirst*. The balance due at the end of any given period might equal the sum secured by the bond and the interest. Suppose the bond to be given at the commencement of the dealing, it is not to be supposed, that they would go on dealing without security. From the nature of the transaction, this must have been intended to be a continuing security. This is clear as to the principals, the customers; and the surety, according to his engagement for the principals, is liable to the extent of the sum secured by the bond.


25th March,
1898.

For the Respondents, Mr. *Pemberton* and Mr. *Jacob*.

We propose first to consider what the effect of the legal rights of these parties will be under the instrument which they have executed, and according to the authorities applicable to the subject which have been cited for the Appellant, and then to make some observations on the objection as to

* 1 Starkie, 483.

the form of proceeding. Looking at this instrument without reference to any extrinsic circumstances, the necessary effect of it is to secure a debt then actually due, and not any future or contingent debt. Supposing that any extrinsic circumstances could be received to alter the operation of that instrument as against the principal debtors, it is impossible, consistently with principle, to give any effect to those extrinsic circumstances as against the surety. Looking at the instrument without reference to the authorities, the question between us is whether this bond was given or purported to be given to secure a debt then actually due, or whether it is given to secure a debt not then actually due, but some debt which might in the course of transactions between the parties become due. The bond was in the common form of a money bond, by which the parties jointly and severally bound themselves in the sum of 20,000*l.*; the condition of the bond is this, “ That if the
 “ above bound Thomas Fidgeon, Edward Getley,
 “ Henry Lomas, and William Fidgeon, or some or
 “ one of them, their, or some or one of their, heirs,
 “ executors, or administrators, or any of them,
 “ shall and do well and truly pay or cause to be
 “ paid unto the above-named Thomas Walker,
 “ Samuel Walker, Jonathan Walker, Vincent Eyre,
 “ and Richard Stanley, or any of them, their or
 “ any of their executors, administrators, or assigns,
 “ the full sum of 10,000*l.* of lawful money of the
 “ United Kingdom of Great Britain and Ireland,
 “ current in England, upon demand, together with
 “ full lawful interest for the same from the date here-
 “ of, of like lawful money, without any deduction
 “ or abatement whatsoever (except for the property

1837.

 WALKER
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

“ tax as required by law), and without fraud or further delay, then this obligation shall be void and of none effect, or else shall remain in full force and virtue.” If you look at the bond itself there cannot be a question whether it is a bond to secure a sum of money then actually due, a debt, or whether it is an indemnity bond against any balance which may hereafter become due in the course of transactions between the parties. How are you to look at an instrument for the purpose of ascertaining whether it is to secure a sum actually due? The sum secured is to bear interest from the date of the bond, and further, it is an interest actually payable from the date of the bond, because the property tax is to be deducted from it. The property tax is payable in respect of the income which, from time to time, is to be received by the persons to whom the bond is given, and to be deducted by the individual who is to make the payment. Is it possible for a party who stipulates to receive interest from the date of the bond, and at the same time agrees to allow that which the law would compel him to allow out of the income of the property, to say that on the face of the instrument no such sum of 10,000*l.* was due, that no such interest was payable, and consequently no such property tax liable to be paid or deducted? If it stood on the bond itself, how is it possible to get rid of this express declaration? Is there any thing in the authorities which is inconsistent with this? By a collateral agreement between the parties it might have been converted into a collateral security for the ultimate balance; but that would not affect the question as between the obligor and obligee of the bond; for instance, suppose William Fidgeon had been indebted to these customers and had given them a

bond for 10,000*l.*; that bond for 10,000*l.*, as between the customer and the banker, might have been adopted to secure what would be ultimately due on the account between the customer and the banker; but that would not affect the question of liability as between the obligor and obligee of the bond; the obligor would remain liable only to the extent he had agreed to become liable, and if the debt in respect of that bond was paid to the obligee, of course those who claimed by equitable deposit, or any agreement between the obligee and themselves, could only claim that which, as between the obligor and obligee, would be due. Upon a plain money bond, such as this, to secure a sum of 10,000*l.* with interest from the date of that security, and the property tax out of it, is it possible to argue from what appears on the face of the bond, that it is any thing but a bond to secure 10,000*l.* then due? Supposing it had been to secure 10,000*l.* actually due, in what other form could it be? It is not usual in a common money bond to secure a sum of money then due, to introduce any recital; but you bind yourself in a penalty conditioned for the payment of the amount of principal and interest; but supposing an account had been settled and a balance struck, and a sum of 10,000*l.* had been ascertained to be that balance, and William Fidgeon consented to become bound for that balance, could the bond be in any other form than it now is? If it had been intended as an indemnity or as a guarantee against any balance, which, in the course of the transactions between the bankers and their customers, might become due, is that the form in which it would appear? Why surely in that case it would have been an instrument very different from that

1837.


WALKER
&
HARDMAN.

1837.


WALKER
v.
HARDMAN.

which we find it ; it would then have been not a common money bond, but a guarantee and indemnity bond, it would not have been in all probability between the same parties, because if it was intended to secure the ultimate balance, that might become due in respect of a partnership account in the form in which the bond now is, the death of any one of the parties or admission of a new party, would destroy the effect of the bond. On considering the nature of the transaction in all cases where instruments of this description are prepared for the purpose of securing the balance of an account which may go on for years (and according to the argument on the other side there is nothing to limit it to any period), it might have gone on up to the present period if the customer had not become bankrupt ; in such case would not the bond be to the parties to secure any balance which in the course of the dealings and transactions might become due to them, or the persons who, from time to time, might constitute the banking firm ? but if, on the contrary, you find the instrument itself is in the only form in which it could be to secure the existing balance at the date of the bond, and if you find it is useless as an instrument intended to secure the ultimate balance of the account subsisting between the parties, what more can you have in order to show that it is that which it purports to be, and not that which it is in argument contended to be ?

The cases may have put a construction on instruments of this sort, which is so conclusive, that against all reason and sense you may be bound by precedent ; but there is nothing which has the least application in the authorities cited to any

proposition of that description. In the cases cited, there is but one that bears upon the question. With respect to *ex parte* Langston, a case where there was a deposit of title deeds to secure a sum of money, it was decided that that deposit may be extended by parol to subsequent advances as well as to the debt due at the date of the deposit. The decision has been followed; but it is in effect a repeal of the statute of frauds, and does not bear on this question. Nor do any other of the authorities cited, except *Woolley v. Jennings*, which has a material bearing upon this case.

The question which arises on the present occasion, and which arose in Clayton's case, and all the subsequent authorities, is this, where you keep an account current, you apply the credit side of the account to discharge the items on the debit side of the account, and consequently the principle in Clayton's case, can by possibility apply only to those cases in which the debt to be discharged is on the debit side of the account. In the case of *Pease v. Hirst*, the principle is entirely different; Clayton's case could have no application to it, for in *Pease v. Hirst*, the debit was never found on the debit side of the account at all. *Pease v. Hirst* is simply this. A customer keeps a running account with his banker in the ordinary way, a customer may have two accounts, which are generally designated a loan account and a current account, for as soon as you borrow money from the bankers and make a deposit of securities for the loan, what is the consequence? The banker gives you credit in the running account for the amount of those advances, he retains those securities which he has in his hands, he does not introduce the securities

1837.

WALKER

v.

HARDMAN.

1837.


WALKER
v.
HARDMAN.

on the debit side of the account, or charge you with the amount he advances ; but he gives you credit for it on the credit side of the account, and it being a loan account and not a current account, it is never introduced on the debit side of the account, otherwise in truth the transaction would be unintelligible, one side would balance the other. That was exactly what was done in *Pease v. Hirst*. A man keeping a current account with his banker borrowed 300*l.*, and to secure that 300*l.* he gave a promissory note by himself and three sureties. The bankers advanced 300*l.* on the credit of that note, and they gave him credit for it in the current account ; but the note never was found on the debit side of that account, and it never was contended on the authority of Clayton's case, that that debt could be discharged ; from the nature of the thing it was never in that state in which the application of the credit could apply to the discharge of the debit ; but why was it contended in *Pease v. Hirst*, that the note was discharged ? On a totally different principle, that there was a period at which the bankers had in their hands more than 300*l.* belonging to their customer, and therefore they were bound to apply that 300*l.* which they once had in their hands, in discharge of that promissory note which they held from him and others. The case was decided on a principle entirely different from that of Clayton's case, and it appears to have depended upon there being an actual balance in the banker's hands, which they might have applied to the purpose of discharging the note, and which they were bound to apply ; in point of fact they did not so apply it, and the Court said there was no appropriation by the party who made the pay-

ment. That being so, the person who received it had a right to appropriate it; he said, he was not bound to appropriate it to the loan account; but he had a right to carry it to the credit of his debtor on the running account; but it is obvious that that has nothing to do with Clayton's case, because in Clayton's case, and here, it is not contended that the customer ever had a balance due to him from the bankers; but the ground on which in Clayton's case it was held that the debt was discharged, and the ground on which it was discharged, was this: that the balance being on the debit side of the account, the payments which were made from time to time, though with corresponding advances by the bankers from time to time, had the effect of making an appropriation by the creditor of money balances from time to time received, and of appropriating the earliest payment to the earliest advance; but the principle does never apply to a case where the debit is never found in the debit account at all, the very foundation of that principle does not apply, and, accordingly, *Pease v. Hirst* distinctly establishes this proposition, and no more, that where there is a loan account and a running account, and where the bankers had in their hands at a particular period money due to their customer, sufficient to discharge the security in their hands, they were not bound to apply the surplus monies in the running account in discharge of the security on the loan account. The case of *Hargraves v. Smee* has no more application than *Pease v. Hirst*. In *Hargraves v. Smee* the question arose on the construction of a guarantee in these words, "I do hereby agree to guarantee

1837.

WALKER
v.
HARDMAN.

1837.

 WALKER
 v.
 HARDMAN.

“ the payment of goods to be delivered in umbrellas
 “ and parasols, to John and Edward Augustus
 “ Smee, at No. 38. Milk Street, Cheapside, London,
 “ according to the custom of their trading with
 “ you in the sum of 200*l*.” And the question on
 that guarantee was this, whether, after goods
 to the amount of 200*l*. had once been advanced,
 and other goods had been paid for, the gua-
 rantee was discharged, or whether that guarantee
 extended to secure goods to the amount of
 200*l*. during the continuance of the dealings be-
 tween the parties in whose favour the guarantee
 was given, and the parties to whom it was given.
 The decision in that case depends and it is put in
 the judgment on the words “ According to the
 “ custom of their trading with you.” It was ex-
 tremely difficult to distinguish that case from two
 others cited of *Wright v. Russell* and *Pearsell v.*
Summerset ; but the Chief Justice Tindal in the
 decision he came to founds himself expressly on
 the course of trading ; he says, “ The question is,
 “ what is the fair import to be collected from the
 “ language used in this guarantee? The words
 “ employed are the words of the Defendant in this
 “ cause ; and there is no reason for putting on
 “ guarantee a construction different from that
 “ which the Court puts on any other instrument.
 “ With regard to other instruments the rule is,
 “ that if the party executing them leaves any
 “ thing ambiguous in his expressions, such am-
 “ biguity must be taken most strongly against
 “ himself. From the present agreement, I collect
 “ that there were two parties already in a course of
 “ dealing ; when the Defendant goes to guarantee
 “ the payment of goods to be delivered according

to their custom of trading, I cannot but imply there had been some preceding dealing, and I am confirmed in this by the finding of the jury, that the custom of the parties was to make up certain monthly accounts. I collect thence, an intention that this course of dealing should continue, which would render the guarantee a continuing guarantee. If we were to put on it the limited construction which has been contended for, we should deprive the party of the benefit which appears to have been contemplated. If one supply of goods to the extent of 200*l.* would satisfy the stipulation in dispute, there is no course of trading to which the words ‘in their course of trading’ could be applied. The cases on this subject run so nearly into each other, that it is difficult to reconcile them; but the distinction between this case and *Melville* and *Haydon* is, that here the Defendant meant to keep two persons engaged in trade, ‘in their established custom of trading.’” Mr. Justice Park puts it on this ground, “The true sense has been put by my Lord Chief Justice on the words ‘delivering according to their custom of trading,’ and when we consider that the persons to whom the goods were to be delivered were the sons of the Defendant, we should defeat the intention of the parties if we were to hold that his liability was determined upon a single delivery of goods to the amount of 200*l.* There is enough here to show that the guarantee was to continue till notice should be given to determine it.” Even in this case Mr. Justice Gazelee differs from his brethren on this point; he says, “I have great difficulty in deciding this case, and I am rather inclined to come to a different conclusion.

1837.



WALKER

v.

HARDMAN.

1837.

 WALKER
 v.
 HARDMAN.

“ It is hard to distinguish it from *Melville v. Hayden*. There the parties were to account quarterly, and yet the Court held the guarantee to be restricted to a single dealing. There are, however, other facts in this case which are in favour of the decision which the Court has pronounced.” In that case the guarantee expressed that it was a security for the advances to be made according to the course of dealing, and upon the introduction of those words and on that ground alone that guarantee, which otherwise must certainly, according to all the authorities, have been held to be confined to a single advance of 200*l.*, was held to be a fluctuating guarantee for any advance of 200*l.* from time to time to be made. The case of *Woolley v. Jennings*, has a nearer application to this case than any of the others.

This case is entirely distinguishable from *Woolley* and *Jennings* on principle, and what is more important, it is clearly distinguishable on this ground, that the present case is one between the surety, and not between the principal debtor and the bankers, a ground which is conclusive. The case of *Woolley* and *Jennings* has been quoted from *Barnewall* and *Cresswell*’s Reports; but it is of so much importance that your Lordships should see accurately what the ground of the decision in *Woolley* and *Jennings* was, that it is material to cite it from two other books. It is reported first at *nisi prius*, in *Carrington* and *Payne*’s Reports * and when it came before the Court of King’s Bench, it is reported more fully in *Dowling* and *Ryland* than in *Barnewall* and *Cresswell*. In the former it is thus stated, — “ Trover for goods and

* Page 144.

“ bills of exchange ; plea, general issue. It ap-
“ pears that the bankrupts and the defendants
“ having had considerable dealings, and a balance
“ of about 4000*l.* being due to the defendants, the
“ bankrupts, on the 20th of January, 1823, gave a
“ warrant of attorney to confess judgment to the
“ defendants. This warrant of attorney was en-
“ dorsed — ‘ The within warrant of attorney was
“ ‘ given to secure the sum of 4000*l.*, with lawful
“ ‘ interest thereon.’ By a statement of the ac-
“ counts between the bankrupts and the defend-
“ ants (which statement was partly in the hand-
“ writing of one of the defendants, and contained
“ the whole of their dealings up to September
“ 22d, 1823) it appears, that payments had been
“ made by the bankrupts between the date of
“ the warrant of attorney and the time of the
“ making-up of the account, to an amount of near
“ 20,000*l.*, but that there were dealings on the
“ other side of the account to near the same
“ amount ; and no mention was made of the war-
“ rant of attorney. On the face of this statement
“ a balance of 2409*l.* 4*s.* 9*d.* appeared to be due
“ to the defendants, exclusive of any sum that
“ might be due on the warrant of attorney.
“ On the 4th of October, 1823, a writ of *scire*
“ *facias* was sued out by the defendants against
“ the bankrupts, on the warrant of attorney ;
“ and on the 29th of October the commission of
“ bankrupt issued. The question therefore was,
“ whether the warrant of attorney had been satis-
“ fied by the payments that had been made. —
“ Abbott, Chief Justice : It appears by this ac-
“ count that sums very much exceeding 4000*l.* were
“ paid after the warrant of attorney was given,

1837.
WALKER
v.
HARDMAN.

1837.


WALKER
v.
HARDMAN.

“ but that there is nearly as much on the other
“ side of the account. On this the assignees con-
“ tended, that as soon as a sum of 4000*l.* was paid,
“ there was an end of the warrant of attorney, it
“ being satisfied. Now, can you, Mr. Attorney-
“ General, adduce any evidence that any payment
“ was made specifically to reduce this warrant of
“ attorney. — The Attorney-General: I cannot,
“ my lord. — Abbott, Chief Justice: Then I think
“ that this falls within the general rule of law.
“ The payments were made generally, and the re-
“ ceiver put them to the current account; there
“ is no appropriation of the money by the debtor;
“ he leaves it to the creditor to put it in reduction
“ of either debt, and the creditor appropriates it
“ to the running account. — Sir F. Pollock: The
“ question intended to be raised is, whether there
“ can be a running security given by a trader for
“ his creditor to have immediate execution for
“ debts that became due afterwards. — Abbott,
“ Chief Justice: I am not called upon to decide
“ that abstract proposition.” This occurred at
Nisi Prius; and the question never was raised,
that is quite clear, although the principle might
have been adverted to. In the confusion which
happened at *Nisi Prius*, and which happens there
very frequently, the principle of Clayton’s case
was not adverted to, neither was it made a
question whether it was a running guarantee
or not, or whether it was to secure a debt due
at the date; but the question raised was this,
Has that been paid by the subsequent advances?
To which the judge says, Can you show subsequent
payments made on that account? The Attorney-
General answers, No; and he says, The debtor

had a right to appropriate, and he did not appropriate. It is quite clear the principle on which it is now stated at your Lordships' bar, viz. That this was not to secure the debt then due, but was to secure the balance that might ultimately become due, never was the point raised at the trial; nor was it the point on which the decision was there pronounced; nor was it the ground on which the Chief Justice decided it: not only was it not so, but it is quite clear, from the report in *Dowling* and *Ryland*, that the principle on which it was argued at *Nisi Prius*, and at the trial, is consistent with the fact of its being a running guarantee. If it was to secure, not a debt then due, but a debt which might ultimately become due when the transaction closed, or when judgment was entered up on the warrant of attorney, the mere appropriation by payment could have nothing to do with it. The question put by the Chief Justice was wholly beside the point, as the answer given was also: but Sir Frederick Pollock there says, "The question intended to be raised is, whether there can be a running security given by a trader for his creditor to have immediate execution for debts that became due afterwards. Abbott, Chief Justice: I am not called upon to decide that abstract proposition." On what ground was it that the Judge then charged the jury in favour of the plaintiff? Surely upon this, that there was no appropriation made by the debtor of the sum which he paid to discharge this particular security on that warrant of attorney, and consequently that they never had been so appropriated.

Lord Lyndhurst. — Clayton's case would not apply, because it formed no part of the account.

1837.

WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

For the Respondents. That at once gets rid of the authority of the case, as applicable to the question now before the House.

Lord Lyndhurst. — Considering the subject in that view.

For the Respondents. As the case is reported in *Barnewall and Cresswell*, a warrant of attorney given to secure the payment of 4000*l.*, with lawful interest thereon, (not from the date which it is here, not deducting property-tax as here,) but a warrant of attorney to secure 4000*l.*, would seem to show that the 4000*l.* was due when the warrant of attorney was given. It would not appear to import futurity, and the sum then due is that for which it is to be the security. But a bond or a warrant of attorney to secure 4000*l.*, with interest thereon, can only mean to secure 4000*l.* then due, with interest from that time. It is said, *per curiam*, according to the report, not professing to give the observations of the Judges themselves, but what the reporters collect to be the substance and import of the judgment *per curiam*. See *Kirby v. The Duke of Marlborough*. Lord Ellenborough said, “ This is a bond given by the surety as an “ indemnity for advances to a definite amount; it “ is the same as if the surety had expressed that “ the bankers might lend to the amount of 3000*l.*, “ and when the advance was made to that amount “ the guarantee became *functus officio*, and was “ not a continuing guarantee.” This case is very different; there is nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be con-

strued as a continuing security. It is not probable that the Court of King's Bench ever said any such thing. In *Dowling* and *Ryland** your Lordships will find this reported, not *per curiam*, but with the judgment of each of the Judges; and they put it on a totally different point, and one quite inconsistent with the previous authorities, and with the law: they put it on this, that, where the words are ambiguous, you must look at the course of dealing between the parties, and then the course of dealing will show this must be a continuing guarantee, and not a particular guarantee.

Lord Lyndhurst. — It is quite a different view of the subject from what took place at *Nisi Prius*.

For the Respondents. When you find, out of three reports of this case, two to a certain degree corresponding with each other, and in the other report you have nothing which professes to give the judgment of the Court, or the opinions or language used by each judge, but only gives what the reporter considers to be the effect of the judgment, and you have, on the other hand, a detailed account of the opinion of each judge, and the grounds on which it is put, the more detailed account is that which you would be more disposed to rely on. The case reported in *Dowling* and *Ryland*† is the same case, but undoubtedly the judgment is not the same; it is more detailed; and grounds are stated which will make it consistent with prior authorities, which, I will undertake to say, no ingenuity can make consistent with the decision in *Woolley v. Jennings*, as reported in *Barnewall* and *Cresswell*, putting it in the form of a guarantee, without reference to the

1837.



WALKER

v.

HARDMAN.

* Vol. vii. p. 824.

† Ibid.

1837.

 WALKER
 v.
 HARDMAN.

transaction. The argument, as it is reported in *Dowling* and *Ryland*, does not differ from the report in *Barnewall* and *Cresswell*. With respect to the judgment of the Chief Justice, he adhered to his opinion expressed at *Nisi Prius*. I take it for granted, therefore, he did not assign any reason. Mr. Justice Bayley says, — “ This is a question of
 “ construction on the terms of the defeasance. It
 “ is probable that at the time when the warrant of
 “ attorney was given there was more money due
 “ to the defendants than the defeasance specifies.
 “ There is nothing to show that the warrant of
 “ attorney was to be discharged as soon as pay-
 “ ments were made to the amount of 4000*l*. The
 “ plain inference from the terms of the defeasance
 “ is, that the warrant of attorney was to remain as
 “ a security at all events to the extent of 4000*l*,
 “ at whatever period the accounts between the
 “ parties were taken. If we are to look at the
 “ nature of the security, and the course of dealing
 “ between the parties, we must give effect to the
 “ import of the defeasance, especially where the
 “ language is ambiguous, and may be applicable
 “ either to a balance due at the time the warrant of
 “ attorney was given, or to a running security for
 “ the balance which should be ultimately due. It
 “ is obvious that this is meant as a security at all
 “ events to the extent of 4000*l*., and with a view
 “ to the continuance of the dealings between the
 “ parties. Unless it was meant as a continuing
 “ security, it might very soon have become of no
 “ use at all.”

Lord Lyndhurst. — That is what they say here.

For the Respondents. That will be considered presently: — “ Because, if the bankrupts had made

“ payments to the defendants, to the amount of
 “ 4000*l.*, shortly after the date of the security,
 “ and then became indebted again on a running
 “ account, the defendants would have had no re-
 “ medy. In the absence, therefore, of some ex-
 “ pression on the face of the warrant of attorney,
 “ or of the defeasance, showing that it was in-
 “ tended to secure only the balance due at the
 “ time when it was given, I am of opinion it must
 “ be construed as a continuing security for any
 “ balance which might be afterwards due to the
 “ defendants. This is not like the case of *Kirby v.*
 “ *The Duke of Marlborough*, where there was an
 “ express stipulation on the part of the defendants
 “ not to be answerable for moneys advanced ex-
 “ ceeding a certain sum ; but here, assuming the
 “ language of the defeasance to be equivocal, I am
 “ of opinion that, looking at the terms of the war-
 “ rant of attorney, it is to be considered as applicable
 “ to any balance which might appear to be due at
 “ any time from the bankrupts to the defendants.”


Lord Lyndhurst. — That does not appear to me to be different from the other report.

For the Respondents. It appears to differ from it materially ; it says, considering the language of the instrument to be ambiguous, you are to look at the nature of the transactions, and the course of dealing between the parties.

Lord Lyndhurst. — That is added.

For the Respondents. It is an addition of great importance ; because, if you are to reconcile *Woolley v. Jennings* with *Kirby v. The Duke of Marlborough* —

Lord Lyndhurst. — Read the closing expression of the Court, in *Barnewall* and *Cresswell*.

1837,

 WALKER
 v.
 HARDMAN.

1837.

WALKER
v.
HARDMAN.

For the Respondents. “This case is very different. There is nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be construed as a continuing security.”

Lord Lyndhurst.— It says, where it is equivocal we will so construe it.

For the Respondents. It says, *primâ facie*, it is a continuing security on the face of it: in the other report they say it is ambiguous, and we will look at the course of dealing to explain it; and then they show it could not be intended to be a warrant of attorney to secure a present balance.

Lord Lyndhurst. You say there is no evidence as to the course of dealing in that case of *Woolley v. Jennings*?

For the Respondents. — We say a great deal more, which, with your Lordship’s permission, we will come to presently. If we make out, on the face of the instrument itself, that it purports to secure a present debt it is then for those who say it is not to secure a present debt to show from the course of dealing, or other circumstances, that it was not intended to be that which it appears on the face of it to be. Can you hold that *Woolley v. Jennings* is a decision independent of the course of dealing, that a warrant of attorney so given is to be held as a security in payment of a future balance; how is it possible to arrive at that conclusion unless you admit the course of dealing, for which there is no foundation; for obviously it does not import any course of dealing? A warrant of attorney to secure a sum of money to A. B.,

with interest, does not import any dealing or any security, except the acknowledgment of a debt on which execution might be issued for the amount of it, but except with reference to the course of dealing it is impossible to lay a foundation for the argument; but, admitting the course of dealing, and looking at the purpose for which the security was given in this case, as to which there can be no doubt, the intention of those who gave and those who received the instrument was that the acknowledgment of both parties was equal; and, therefore, whatever was the intention of one must be considered to be the intention of the other, as far as it appears on the security. The instrument in this case was very distinguishable from the instrument in the former case. In the first place, it was there a warrant of attorney to enter up judgment at a future time; it was obviously, therefore, not in its nature a security for a present debt: it might or might not be; but, as judgment, if entered up on the warrant of attorney, was to be so entered up at a future time, it follows that, until the judgment was entered up, there was no security. Suppose the party had become bankrupt before the warrant of attorney was executed, it was in itself no security, but it enabled the party to obtain a security. It imported futurity. It was that which was a security to be constituted at a future time for a debt, not a security given by the warrant of attorney itself.

Lord Lyndhurst.—I believe the practice is to enter up judgment immediately: that is the course.

For the Respondents.—It may or may not: it would be very injurious to trade; and it is not the habit, in the course of mercantile transactions,

1837.


WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

where a security of this kind is given, to enter up judgment immediately; for the consequence of that would be, that the entering up the judgment would, in all probability, be the ruin of the credit of the party. In this case the warrant of attorney is given in January, and judgment was not entered up till October. The very purpose of giving a warrant of attorney principally is to keep the transaction quite secret, and to prevent the debtor having his credit injured, and yet, at the same time, to give his creditor a security.

The Lord Chancellor. — This bond is, in one sense, future: it is not payable on any particular day, but it is payable on demand.

For the Respondents. — The bringing the action is sufficient to constitute the demand; but the distinction is this, that the warrant of attorney is itself no security. You cannot bring an action on the warrant of attorney: it binds nobody. You may enter up judgment upon it, which enables you to get a security for it.

Lord Lyndhurst. — You can enter up judgment *instanter*, to enable you to take out execution when you like. If a party does not enter up judgment, it is perhaps because he is requested not to do it; but he has a right to do it at any moment, unless the party bargains to the contrary.

For the Respondents. — And at that moment he obtains his security; but it is not so with a bond, which is a security from the date of it. Suppose a man, wishing to bind his real estate, gives a warrant of attorney, and dies before judgment is entered up: it would be no specialty debt at all. The bond is an instrument which, at the moment, creates a debt at law, and the warrant of attorney

does no such thing; but even in the case of the warrant of attorney, where a warrant of attorney is given to secure 4000*l.*, with interest, apparently it would mean 4000*l.* and interest from the date of the warrant of attorney; but it is not so held: it would, however, be impossible to say that it was not for a debt now due. If it had been to secure 4000*l.* or 10,000*l.*, with interest, from the demand, it would have been a totally different thing; but here it is expressly from the date hereof, and it is not confined to the direction to pay from the date hereof, but allowing the property-tax out of the income, therefore clearly contemplating the regular payment, with interest, till the debt is satisfied. Well, then, independently of dealing, suppose this had been a simple bond, by William Fidgeon to these parties, to secure 10,000*l.*, with interest, and allowing the property-tax, surely it would be impossible, on any ground of reason or law, to doubt that it was an acknowledgment that a sum of 10,000*l.* was then due; and that it was given to secure the sum of 10,000*l.* then due? Then that sum would appear to be payable without further inquiry, unless the Defendant introduces some explanation by way of defence.

Let us see how the case is varied by the extrinsic circumstances here. The evidence of a fact, introduced on behalf of the Appellant, is quite conclusive on the point in this case, with respect to the intention, because they say, there is no such sum as 10,000*l.* then due; there was only 2300*l.* then due, and therefore, as between the bankers and customers, it could not be intended to secure a balance of 10,000*l.* then due, or a larger balance of which 10,000*l.* was a part. That is a very sin-

1837.


WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

gular argument, considering that the statement in their bill, and the evidence upon which they obtained their decree in this cause, expressly sought to establish, not only that a larger balance than 10,000*l.* was due, but that this bond was given to secure that larger balance; that a larger balance than 10,000*l.* was due at the date of the bond, and this bond was given for the purpose of securing the sum of 10,000*l.*, part of that balance, then due. In the Appendix to the Appellants' case you will find the evidence of Mr. Brookfield, the solicitor, who was acquainted with the transaction, and who, by his evidence, established this bond. At page 17. of the Appellants' Appendix your Lordships will find this: "This deponent saith, that he has seen the
" paper writing, marked A., now produced to him,
" this deponent, and it is a bond from Thomas
" Fidgeon, Edward Getley, Henry Lomas, and
" William Fidgeon to the complainants in this
" cause named, for securing to them the sum of
" 10,000*l.*, and lawful interest from the date there-
" of; which said sum was part of a much larger
" balance due to the said complainants, at the time
" of the execution of the said bond, from the said
" Thomas Fidgeon, Edward Getley, and Henry
" Lomas." Is this a mistake? It is perfectly true, true to the letter; and not only so, but it is confirmed by the examination which this witness afterwards put in: at page 20. of the Appendix, your Lordships will find how he states it: "These
" examiners severally say, that the bond therein,
" and in the former answer and examination of
" these examiners mentioned, was given as a se-
" curity (to the extent of 10,000*l.*) for the balance of
" the banking account in such former examination

“ mentioned, and which balance did, at the date
“ and execution of such bond, exceed, and hath
“ ever since exceeded, and now exceeds the sum
“ of 10,000*l.*, and the same bond was not given
“ for any other specific sum of money ; and these
“ examinants say, that, besides the said bond, they
“ hold sundry bills of exchange, as securities for the
“ balance of their said banking account, and which
“ were given to these examinants by Thomas
“ Fidgeon, Edward Getley, and Henry Lomas.”

This at once displaces the whole of the argument on the other side as to the dealing ; viz., that these bills were brought into the account as cash ; that they were not discounted but treated as cash ; and until those bills of exchange were dishonoured, that the advances which had been made by the bankers never could be considered as a balance. They tell us here directly the contrary, according to their own statement, and the evidence of Mr. Brookfield, their witness, as to what the dealings were. They entered the amount of these bills, it is true, in the account, not discounting them, not treating them as cash, but reserving them as securities for the amount of the advances : whatever they paid in respect of the advances was so much paid for while they held these bills as a security : they are quite accurate, therefore, when they say there was 10,000*l.* due at that time.

Lord Lyndhurst.— Striking out all the running bills on both sides, how would the balance be then ? We ought to have the account.

Sir Frederick Pollock.— If you strike off all the bills on both sides, there would be a very large cash balance due to the bankers from the customer, amounting to between 20,000*l.* and 30,000*l.*

1837.

WALKER
v.
HARDMAN.

1837.

WALKER
&
HARDMAN.

Lord Lyndhurst.—At the date of the execution of the bond?

Sir Frederick Pollock.—Yes, they were in the habit of paying in bills received in the course of trade, and immediately drew on the credit of those bills.

Lord Lyndhurst.—Those bills were in the nature of security for a cash balance; we need not look at the accounts after that admission; they used to draw against the bills in a certain proportion to the amount of the bills.

Sir Frederick Pollock.—No, my Lord, the bills were paid in as cash, and were given credit for, and entered into the account as if so much was paid into the bank, and then the interest account was settled at the end of the year.

The Lord Chancellor.—Those are the bills on the credit side of the account, with which the bankers have nothing to do.

Sir Frederick Pollock.—They were not entered short, according to the usual practice in London, which is that they shall be entered into the account as soon as assets are made available.

The Lord Chancellor.—How were the bills on the debit side of the account?

Sir Frederick Pollock.—If they applied for and obtained a bill, their account was debited with that bill.

The Lord Chancellor.—Those were bills to which the bankers were parties; and if they were parties it became their debt. Those bills to which the bankers were parties could not be struck out of the account again, but the bills of other parties might.

Lord Lyndhurst.—And suppose there was a cash balance besides the bills?

For the Respondents.—Strike out the bills, and 10,000*l.* was due.

Sir Frederick Pollock.—The bills were taken as cash on both sides.

Lord Lyndhurst.—Suppose you include all the bills that were ultimately paid, how was it?

For the Respondents.—There was a balance to the amount of 20,000*l.*

Sir Frederick Pollock.—If you take the account, treating the bills, as they were treated, as cash, and striking the balance one way or other, the account was 2300*l.*

For the Respondents.—That is if you include and give them credit for all the bills which were never paid, and which they say were held as security, in that case there was only 2000*l.* due; but treating this as they swear they held it, that is, as a security for the amount of the bills, there was 28,400*l.* due. They have sworn it, and it is proved by the examination of Mr. Brookfield, their attorney, who was the party to the re-execution of the bond, that there was a larger balance than 10,000*l.* due; and this bond was expressly taken to secure that balance.

Lord Lyndhurst.—A country banker receives bills as security from his customer, and the customer takes bills from the banker instead of cash. It is for the customer's accommodation that he takes them as cash.

For the Respondents.—There is only one account. When this transaction originally took place, the law in Clayton's case was not established, and therefore they took this for the amount of the balance, not considering that by the law, which was

1837.



WALKER

v.

HARRINGTON.

1837.

WALKER
v.
HARDMAN.

not then so well understood, the effect of that would be to destroy that balance: at that time traders were not aware of the doctrine of that case, and they took it as a security; they were not aware that by the course of dealing, the effect of that would be to destroy the security; but that cannot alter the rights of the parties as they were at the time of the transaction, and as they swore they were. Clayton's case was decided on the 3d of July, 1816; but it was not reported till some time afterwards.

At that time the importance of this doctrine was not known: a large balance was owing; and they take a bond to secure 10,000*l.*, part of that balance, not being aware that, by the effect of the mode in which the account was subsequently dealt with, that the bond would be discharged. Is it possible to say that, because by a subsequent development of the law, not within their knowledge at the time when the transaction took place, they can change the nature of the transaction, which they themselves have sworn to, and established by evidence in their own cause?

Lord Lyndhurst.—It was found by the Master in this case, that, as against them, the principals, the bond was against the running balance.

For the Respondents.—The principals having become bankrupt, it has never become material to enter into the consideration of that question; and they being unable to pay the demand, the question arose only with the surety. Supposing you are to look at the course of these dealings for the purpose of giving a different interpretation to the bond from that which the bond itself would bear on the face

of it, how is it possible to fix the surety with notice of that agreement? What is the evidence against the surety? There is no evidence whatever against the surety, except the simple fact, that his name and seal are found attached to the bond, which a witness says, she believes to be his; but that any account was kept between the bankers and the customer, that that account was intended to be continued; that it was the intention of the customer in consequence of this security to obtain further advances, there is neither proof nor allegation. If the surety is to be made liable, it must be upon the security which he has executed; how is it possible to fix the surety beyond the amount of his legal obligation, beyond the amount of that which appears on the face of the instrument which he has executed, unless by some collateral circumstance of which you must prove him to have had notice? Your Lordships need not be referred to the general principle, which is so clearly expressed by Sir William Grant, in *Sumner v. Powell**; the case is not different where you are construing an instrument by which a party enters into an obligation and subjects himself to a liability, and a case where a party subject to a previous liability gives an engagement for a certain portion of the previous liability. The case of *Sumner v. Powell*† was this: a banking firm having a power of attorney from their customer to sell out stock, one of the firm had sold out stock and misapplied it; the banking firm afterwards took in a new partner, who of course was subject to no liability in respect of the transaction, and the partners, together with the new partner, covenanted to give a guarantee against

1837.

WALKER
v.
HARLMAN.

* 2 Merivale, 36.

† Ibid. 30.

1837.

WALKER
v.
HARDMAN.

the loss which might arise from the fraudulent misappropriation of the property by one of the partners. That was made in the form of a joint security; the party who was the surety died, and it was sought to enforce it against his estate, on the ground that being a partnership debt, a court of equity would consider a security of that description a joint and several security, a security to be enforced against his estate, and so it would be against the partners in such a case. Sir William Grant held, in *Devaynes v. Noble*, that the assets of a deceased partner were liable in equity, though not liable in law; and what is the ground on which he held it? That you could not adopt the same construction with regard to the surety; that you cannot bind the surety beyond the letter of the obligation into which he has entered: there is no fresh liability out of which the engagement arises, and where it arises simply on the engagement, it must depend on the extent of the engagement. The expressions of Sir William Grant in that case of *Sumner and Powell* are these:—

“ The question is, whether any other effect can
“ be given to this covenant in equity than it has at
“ law. It has never been determined that every
“ joint covenant is in equity to be considered as the
“ several covenant of each of the covenantors. In
“ the late case of *Devaynes v. Noble* I had occa-
“ sion to examine the authorities on that subject,
“ and found no such general proposition any where
“ laid down. When the obligation exists only by
“ virtue of the covenant, its extent can be measured
“ only by the words in which it is conceived. A
“ partnership debt has been treated in equity as
“ the several debt of each partner, though at law

“ it is only the joint debt of all. But then all have
 “ had a benefit from the money advanced or the
 “ credit given, and the obligation to pay exists
 “ independently of any instrument by which the
 “ debt may have been secured. So, where a joint
 “ bond has in equity been considered as several,
 “ there had been a credit previously given to the
 “ different persons who have entered into the obli-
 “ gation. It was not the bond that first created
 “ the liability to pay. But in this case the cove-
 “ nant is purely matter of arbitrary convention,
 “ growing out of no antecedent liability, in all or
 “ any of the covenantors to do what they have
 “ thereby undertaken.” The principle is obvi-
 ously this: you cannot carry an obligation of the
 surety beyond the letter of his obligation; you may
 no doubt affect the surety with notice, and affect
 him by a collateral agreement; but you must do
 it by proving that notice and by proving that agree-
 ment; and it would be a doctrine the most danger-
 ous that ever was suggested, to hold that a surety
 who enters into an obligation and who gives a
 security to a limited extent, may, by a collateral
 agreement between the principal debtor and cre-
 ditor, have his liability extended beyond the amount
 of that for which he stipulated.

It has been argued for the Appellant, — that
 whatever the obligation was between the princi-
 pal debtor and creditor must, of course, be the
 measure of the obligation between the surety and
 the principal debtor. We utterly deny the proposi-
 tion. Suppose this bond had recited that 10,000*l.*
 was then due, and it was given to secure that
 existing balance; it is quite clear that, by an agree-
 ment between the parties, between the banker and

1837.

WALKER

P.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

the customer, they might have stipulated, that although such was the form of the bond, it should be held as a security for any balance ultimately due ; but in that case would the surety have been held liable for that balance, because he was a surety for the obligation into which the principal debtor had entered ? He only can be held liable for the principal debtor to the extent of the obligation into which he has entered, only to the extent of the notice which he had of the obligation. The surety is to perform that obligation according to the express agreement between the principal debtor and creditor ; his obligation is not to be constituted by agreement to be inferred from the nature of the dealings and transactions between the creditor and principal debtor. It is obvious that, neither in the case of express agreement or implied agreement, can you bind a surety beyond the extent to which he has thought fit to bind himself by the instrument into which he has entered. Even in that case it was held that, as regarded the principal debtor, the party was surety for nothing but the balance then due ; not for that which must be so construed by some collateral agreement to be inferred from the nature of the dealings to which the surety was no party, and by which he cannot be bound.

Lord Lyndhurst.—As far as relates to the principal debtor, Dyson's evidence is, that he admitted to him that it was a security for 10,000*l.* for the advances made and to be made.

For the Respondents.—It is said, that you are to infer from the nature of the dealings that that must be so, although you have no notice of the nature of the dealings. It would be monstrous to bind the surety by that, if on the instrument the surety professes to bind himself to pay the debt

then due, and that debt has been discharged ; there is nothing either in moral or technical equity, which will justify the Court in saying his obligation is to be extended to any thing further. The truth is, the effect was not known to them ; they were not aware that the liability would be increased or diminished by considering it as a security for the ultimate balance ; but they did take the security as a security, as they have sworn, for part of the debt then due ; the subsequent transactions have reduced the debt, and the consequence is, the security is gone.

With respect to the form of proceeding in this case, the first complaint that has been made by the Appellants is of the order of the Vice-Chancellor of 1822, directing a reference to the Master to make an enquiry on this subject, with respect to the purpose for which the bond was given, and it is said no such direction ought to have been made. Now, supposing it to be admitted that that judgment was wrong, what would be the consequence ? You must strike out all that has since occurred, all the subsequent evidence, all the subsequent enquiries ; and how would it then stand on the exceptions ; what would be the evidence on which this must be decided ? The Master had found this was a bond to secure the balance due at the time of the execution of the bond ; to that there was an exception, alleging it was given to secure a debt due when the bond was given, and alleging that subsequent payments had diminished or discharged that debt. Supposing you were to decide this now, on what would you decide it ? On that warrant of attorney and the evidence of Brookfield, the only evidence by which it is expressly sworn that the

1837.


WALKER
v.
HARDMAN.

1837.


WALKER
v.
HARDMAN.

bond was given to secure a larger balance due at the date of the bond. There never was so unreasonable a complaint made in a Court of Justice as the complaint which is made of this order. For whose benefit was it made? Who obtained the order which is complained of? The very parties who now complain of it, who have taken the benefit of it, and endeavoured to support by evidence a collateral agreement extending the purposes of the bond beyond its legal effect, and who having failed in that attempt, now complain of their own success in obtaining the order, because the order was not succeeded by such consequences as they expected. When this matter came on upon exceptions, the evidence could admit of no doubt; there was the evidence of Dyson, no evidence of admission of the principal debtor, no allegation that it was given to secure the ultimate balance; there was no allegation that 10,000*l.* was due upon this bond, with interest from the date of the bond, and there was proof that it was given to secure the balance then due, and no allegation substantiated by proof that that balance had not been paid. The necessary consequence of reversing the order of 1822, will be to make a new decision allowing the exceptions, and referring it back to the Master to see whether any subsequent payments were made or not, because there is no competition of evidence as it stands.

The Lord Chancellor.—The Master had found no payment could be made before this report of 1821.

For the Respondents.—To which the exceptions were taken, and upon these exceptions they complain that the Master ought to have found that the bond was given to secure the payment of the

existing debt ; and, secondly, that the payments subsequently made have diminished or destroyed that debt ; the necessary consequence of the Master's finding that no payments could have been made ; because if it was held that it was to secure the balance due at the time of the bankruptcy, it was a necessary consequence no payments would have been made since. Upon these exceptions, assuming for a moment that the order of 1822 is wrong, what is the consequence, the bond itself professing to be, for a present debt, and the evidence in the cause proving that it was given for an existing debt? Your Lordships must of necessity reverse so much of the decision of the Master which held that it was given for a future debt, and, of course, that no payments could be made. The Vice-Chancellor's opinion with reference to the legal effect of the bond is clear. He was of opinion, that it was at law a bond to secure an existing debt due at the date of it, and it could be nothing else, for the reasons pointed out ; but then he referred it to the Master to make the enquiry, and I allude to it, because there might have been a collateral agreement affecting this bond, or affecting any other bond given by persons not parties to it, but adopted as a security by a third person ; there might have been a collateral agreement in his opinion ; whether legally it could be so may be doubted ; but certainly, the decision in *Woolley v. Jennings* might make that possible, for if you could do it as against the principal debtor, you might also do it against the surety. The Master has found that such evidence only has been laid before him, and on that evidence he has reported ; our exception is that the Master having so stated,

1837.

WALKER
v.
HARDMAN.

1837.

 WALKER
 v.
 HARDMAN.

has come to a wrong conclusion on the evidence and that he has found that which it is admitted ought not to have found on that evidence; the exception therefore is necessarily right. If so, how does it stand upon the substance of the case? If you are now deciding the exception, you must decide it with reference to what was before the Court, and then you have the form of the bond conclusive, or, at all events, made conclusive by the positive oaths of the witnesses produced on the part of the Plaintiffs to prove for what purpose the bond was given. On the other hand, if you say the Vice-Chancellor was right in giving the parties liberty to prove (if they could) by evidence that the liability of the surety was to an extent beyond the legal effect of the instrument which he had executed, have the Appellants shown, or have they attempted to show, that there is any thing by which that collateral agreement is to be established? Is it shown that the surety was party to the acknowledgment the principal debtor made? Is it in proof that he was acquainted with the nature of the dealings between the parties? Is it in proof (I do not say what the probability might be) that he knew it was intended to be a continuing account between the parties? Is there any thing to show that William Fidgeon, when he executed the bond, did not believe that it was for an estimated balance then ascertained, which was to clear all transactions between them? It is insisted that there is not any thing to fix this party with notice. It is argued for the Appellant generally, that he became surety for the principal debtors, and therefore is to be liable for all the obligations of the principal debtors, whether they intended it by the obligation or not. With respect to the last order which was made on

the set of exceptions taken on each side, they do not surely complain of that part of the order which overrules the first exceptions. By the Vice-Chancellor's order of 1822, it was referred to the Master to enquire "Whether this bond was to be held as a security for the particular balance due to the Plaintiffs on the banking account to the date of the said bond, or to the general balance which should from time to time remain due to them." The Master did not find directly either in the affirmative or negative upon that point; but he found that it was the intention of the principal debtor that it should be so held. To that there was an exception which the Vice-Chancellor overruled. It is admitted on all hands to be wrong, upon the evidence of that which passed upon the re-execution of the bond, to find that William Fidgeon was liable; the Vice-Chancellor could not do otherwise than disallow the exceptions. That the Master had not stated various facts as special circumstances which they considered to be material. That is a mere matter of form, and the exceptions are taken for the mere purpose of bringing those circumstances before the Court, and therefore whether they are allowed or disallowed is matter of but little moment; but it is clear in this case they were properly disallowed, for this reason, that he went on the circumstances as between the principal debtor and the creditor, in respect of which the Vice-Chancellor was of opinion, that the Master had come to a right conclusion, having found against us, though the special circumstances were indispensable to be stated, the question being with respect to the security as to which the surety of the principal debtor had a right in relation to it.

1837.

WALKER

v.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

There is no statement in the bill as to the mode of dealing between the bankers and their customers generally, or this customer in particular. According to law, bills paid in to a banker's may be a security for any balance which may be due from the customer, and the bankers may have a lien upon it for that purpose; but it remains the property of the customer, unless it is bought by, or by indorsement and agreement made the property of the bankers. *Giles v. Perkins**, *Thompson v. Giles*.† In this case there is no proof that the bills were indorsed, and it is material that they were not entered in the books *minus* the discount, from which it is to be inferred that they were not received as cash. By the case, as originally made on behalf of the Plaintiffs, it was sworn by their witnesses, that the balance due to them, at the date of the bond, was above 40,000*l*. Now, having found the difficulties of that statement from the application of the law of Clayton's case, they shift their ground and contend that the balance was 2,800*l*. at that time, and this is effected by considering unpaid bills as cash, without regard to discount.

The case of *Copis v. Middleton*‡ shows that a bond paid off by a surety cannot be extended to operate in equity beyond its legal operation. The principle of all the cases on the construction and effect of bonds, as against sureties, is the same; that they cannot be extended. *Lord Arlington v. Merrick*§, *Dance v. Girdler*.||

* 9 East, 12.

† 2 B. & C. 422. *Ex parte Armistead* 2 G. & J. 371.

‡ *Turner & R.* 224.

§ 2 Saunders, Williams's edit. 411.

|| 1 B. & P. New Rep. 34.

Another objection is, that the obligation, as it regards the surety, is for the debt of another, which must be in writing; and the intent, as it regards him, cannot be proved by implication, or by parol declarations, or by any thing which passes between the obligee and the principal debtor. In the cases cited on this point for the Appellant, the Court has always decided on something appearing on the face of the instrument. On this ground and principle *Kay v. Groves* * was decided, where it was held not to be a continuing guarantee. So in *Nicholson v. Paget* † where Bayley J. says, “it is the duty of the party taking such guarantee to see that it is couched in such words as that the party giving it may distinctly understand to what extent he is binding himself.”

Lord Lyndhurst.—This instrument does not, on the face of it, import that it is a guarantee; you must therefore call evidence to show that it is, and may not that evidence also show for what it is a guarantee? In all those cases it is a guarantee on the face of the instrument itself; here it is meant to be a security, a simple bond meant to be a security for something that must be proved by evidence; therefore you may have evidence to show for what it is a security.

For the Respondents.—The Appellant’s counsel, in arguing this case, took it for granted, that the case upon this bill was precisely the same as if tried in an action at law, precisely the same as if an action was brought on this bond against the obligor; and, for many purposes, proceedings in equity on a bond are very similar to those at law; in some respects, however, there are differences;

* 6 Bing. 276.

† 1 Cro. & Mee. 48.

1837.

WALKER
v.
HARDMAN.

1837.


WALKER
v.
HARDMAN.

for example, a bond may be sued on in equity not as a bond, but showing the agreement sought to be specifically performed. There is this distinction also; in proceeding at law on a bond, there is no occasion to allege or to prove any consideration, or any purpose for which the bond was given; it is sufficient to produce the bond; it is sufficient to prove that the condition of that bond has been broken, to call on the other party to prove it has not been broken; on the production of the bond, judgment is given for the amount there expressed, unless it appears that the condition has been performed; but in equity it is differently dealt with. At law the judgment would be given for the total amount appearing to be due on the face of the bond, without any inquiry as to the amount; for instance, on this bond, if it were sued on at law, unless we prove payment of 10,000*l.* and interest, according to the tenor of the bond, there would be judgment for that amount, and the question at law would be simply whether we could show that 10,000*l.* and interest has, since the date of the bond, been paid in such a manner as to be applicable to the payment of the bond.

But there has not yet been any account taken of the dealings between the bankrupts and the bankers; there has not been any reference to the Master until the last reference appealed from, under which he could take an account of the dealings between the banker and the bankrupts subsequent to the date of the bond; there has been no inquiry taken hitherto, as to whether payments made by the bankrupt, since the date of the bond, were or were not appropriated in any particular manner, or to what purposes they are to be applied,

in point of law. What the Appellants now claim is not a sum of 10,000*l.* due at the date of the bond, but a sum which came into existence long afterwards.

1837.
WALKER
v.
HARDMAN.

The Lord Chancellor.—How do the Defendants meet that? There is only a very short passage of the answer upon the subject printed; that puts the issue in a very singular way; “they believe it to be true that the sum of 10,000*l.*, and some interest for the same, hath not been paid to the said Complainants; but whether the whole of the said principal sum and interest, from the date of the said bond is now due, or the amount of what is now due thereon, for principal and interest, on the security of the said bond, or whether the said Complainants have or have not made such demand as in the said bill mentioned, these Defendants cannot set forth.”

Do the Defendants say that the 10,000*l.* was due, and that, by the subsequent transactions, it has been paid? because that is quite inconsistent with the extract in page 5.; they say there, they believe it has not been paid; but whether the whole of the said principal and interest has been paid or not they do not know.

For the Respondents. — They say in effect that they believe it to be true that the whole 10,000*l.* has not been paid, but whether the whole is due they do not know.

The Lord Chancellor.—That is not the necessary meaning of the words; they say, “believe it to be true that 10,000*l.*, and some interest for the same, has not been paid, but whether the whole of the said principal sum and interest is due they cannot say.”

1837.

WALKER
HARDMAN

For the Respondents. — They speak to their belief; it is not admission, and they are not persons acting in their own right.

The Lord Chancellor. — They are bound to put in issue the grounds and purposes of the defence.

For the Respondents. — The Master's office is the proper place to put in a defence as to the debt in a creditor's cause; a new issue is raised there, and it is open to them to take what steps they may; we do not know what other steps have been taken by the other Defendants; they may defend themselves as they please; what an assignee, who has not a principal's knowledge, states with respect to his belief is not taken as binding on him; if it was, it would be very hard on the creditors that they should be bound because the assignee has in his own mind a private view of the case. We put it in this way; with the Plaintiff's bill it is a different thing; he is to state that he has represented it truly, and we put it as showing how they conceived it was at the time, because what he swears, his attorney swears too. Afterwards, when Clayton's case was cited against them, they shifted their ground, and alleged that all they said before was wrong; they said they treated it as a real, not as a fictitious sum of 10,000*l.*, carrying interest from the date of the bond. If the case had any thing to do with the intentions of William Fidgeon, Mr. Brookfield had some means of knowing his intentions, because he had interviews with him. He says, in positive terms, that this bond was given
 “ for securing to the bankers the sum of 10,000*l.*,
 “ and lawful interest from the date thereof, which
 “ said sum was part of a much larger balance due
 “ to the said complainants, at the time of the exe-

“ cution of the said bond, from the said Thomas Fidgeon, Edward Getley, and Henry Lomas.” *

The principle of the report was this, that because they had never received any thing which reduced the balance below 10,000*l.*, therefore the Master was of opinion that they were not to be considered as having received any thing on account of the bond; that is the mode in which he arrives at his conclusion; they had received money on account of the balance, but they had never brought it below 10,000*l.* The Master is to inquire whether they had received any thing on account of the bond; he says no; why? because they had never received any thing that brought it below 10,000*l.* That was the erroneous notion on which the Master proceeded. The report has some symptoms of there being a glimmering of the real state of the law as then decided. The Master's report had been founded on the assumption that money paid on account of a balance not below 10,000*l.* was not paid on account of the bond, although the Master had it established that the bond was given for the last 10,000*l.*; it is plain that all were proceeding on the erroneous notion, that that 10,000*l.*, due at the date of the bond, continued to be due at the end of the dealing, unless, at some intermediate period, the balance had been reduced below 10,000*l.*; that was the point contended for in *Devaynes v. Noble*, the contrary of which was there settled. Towards the latter part of the proceedings before the Master, the real view of it began to be seen, and then we objected, and the exceptions were founded on our objections; these were all founded on the principle of Clayton's

1837.



WALKER

v.

HARDMAN.

* Page 17. of the Appellant's appendix.

1837.

WALKER
v.
HARDMAN.

case; it was observed that there was no exception to that part of the report in which the Master finds that there was 13,000*l.* due to the Plaintiff; it is true there is no exception which states that part of the report which mentions the 13,000*l.*, but there is an exception which states the same thing in effect, that the Master has not taken the account as he was directed to do by the decree; it is our fourth exception. He was directed, by the decree, to take an account of what was due to the Plaintiff and all the creditors; he reported that he had found 13,000*l.* due to the Plaintiff; we except to that, for we say he has not taken “an account of “what is due to the Plaintiffs,” as directed by the decree, but has only inquired what balance was due to the Plaintiffs from the said Thomas Fidgeon, Edward Getley, and Henry Lomas, at the time of the bankruptcy, and has certified, by his report, that the bond is a security for the floating balance. If *Woolley v. Jennings* be distinguished from the present case on any solid and legal grounds, it may be assumed, with confidence, that whatever an agreement means between a principal and the contracting party, it must mean the same thing as between the surety and the contracting party.

In that case the attention of Lord Tenterden was called to this question; can a trader give a running security by a warrant of attorney, which shall protect future dealing and debts not then due? The answer of his Lordship was, that the question did not arise in that case. That was at *Nisi Prius*. When the case was argued before the Court, the Chief Justice stated, that he adhered to his opinion expressed at *Nisi Prius*. Mr. Justice Bayley says, “This is a question of construction on the terms

“ of the defeasance. It is probable that at the
 “ time the warrant of attorney was given, there was
 “ more money due to the Defendants than the
 “ defeasance specifies. There is nothing to show
 “ that the warrant of attorney was to be discharged
 “ as soon as payments were made to the amount of
 “ 4000*l*. The plain inference is that the warrant
 “ of attorney was to remain as a security at all
 “ events to the amount of 4000*l*., at whatever
 “ period the accounts were taken. If we are to
 “ look at the nature of the security, and the course
 “ of dealing we must give effect to the terms of the
 “ defeasance, especially where the defeasance is
 “ ambiguous, and may be applicable to a balance
 “ due at the time the warrant was given, or as a
 “ running security for what might be ultimately
 “ due.” On the other side they say, we care
 nothing about this being a bankers’ account, or of
 its running on for months and being then over-
 drawn ; we pay no attention to the relative situa-
 tion of the parties ; we say that William Fidgeon
 knew nothing of all this, and was no party to it,
 and that the legal construction is, that the bond is
 for a debt which is a debt due at the moment. But
 suppose a bond given before the account began
 be wholly ineffectual, would it be sufficient to
 say, that the bond, on the face of it, is for a sum
 of money then presently due, and therefore, that
 Clayton’s case applies to it, and there is an end of
 the question ? This case is by no means new to me ;
 the doctrine of Clayton’s case is not at all new.
 In *Daw v. Holdsworth**, Lord Kenyon laid down
 the rule broadly, that in a debtor and creditor ac-
 count the credits must be taken to extinguish

1837.
 WALKER
 v.
 HARDMAN.

* Peake’s Rep. p. 60, 61.

1837.
WALKER
v.
HARDMAN.

the earlier debits. That case was this: a man had been made a bankrupt; during the pendency of an account with the petitioning creditor, he ceased to be a trader. At the time the account began he was indebted to the petitioning creditor in upwards of 100*l.*, and so he was at the time when the account was closed, but he ceased to be a trader during the middle period of that account; and the question was, whether that sum was owing from him as a trader? Lord Kenyon said, “This account has been “running on; in Clayton’s case, the earlier debits “were extinguished by the earlier credits, and in “consequence all the debits which existed while “the man was a trader were satisfied; what was “owing were the later debits not paid off, and which “were due from him not being a trader;” and therefore Lord Kenyon held that it was not a good commission. If the bond was given for part of the balance due, it does not follow as a consequence that it was not given for the floating balance, or a future balance which might be due upon the winding up of the account. If no particular balance was contemplated, and none has been alleged or proved by the Respondents, that makes it the more probable that the intention of the parties was that it should secure a floating balance. An advance in bills treated as cash cannot be called in at any time. It is therefore not wholly unimportant in order to come to a proper decision of this case, to enquire what was the relative situation of the parties. Could the bankers have arrested their customer for all the amount of the monies they had advanced to him, and could they have treated the bills then owing merely as securities which they would keep in their drawer for the purpose of

ascertaining whether they would turn out to be good or not? They would, if they attempted to make that arrest, have been liable to an action for a malicious arrest, and if an enquiry had taken place, the parties would have been discharged on giving bail merely for the reduced sum. If that is in strictness the case, the real balance which existed at the time this bond was given, was not 20,000*l.*, or 30,000*l.*, or 40,000*l.*, but merely 2300*l.* which the witness Wood makes it, as I have read to your Lordships, and which it was agreed to be, and admitted and argued on that admission before Lord Chancellor Lyndhurst. This was the effect of the examination of Dyson, the very object of the giving the bond being to obtain further advances, of which a list was given in, and for which the bond was given. What then was the meaning of this bond *quoad* Thomas Fidgeon, Edward Getley, and Henry Lomas? Can there be a doubt that as far as they were concerned, it was a bond given for a floating balance, and have they not always acted on that supposition? Does not the Master find it? Is there not an exception to that finding, and is not that exception over-ruled? The bond was given clearly in that view by the three; the bankers are dealing with their customers; the account is unsatisfactory; and they require security; the customers bring this bond as a security. The surety then is acting by the customer, as his agent.

If this bond was a bond for a continuing guarantee with reference to three of the obligors, it must be so with reference to the fourth; and the Master having the evidence before him, came to that conclusion; he had no evidence except the fact of the bond being re-executed; his conclusion was

1837.



WALKER

v.

HARDMAN.

1837.

WALKER
v.
HARDMAN.

right, but the premises were not sufficiently large ; he had not taken into consideration those points which not only ought, but which must have led him to that conclusion.

Lord Lyndhurst.—Supposing there was nothing on the face of the bond to lead the surety to suppose it was for any thing more than an existing debt, and no communication whatever was made to the surety, would he have been bound by the arrangement with his principal ?

In reply.—I apprehend that he would at all events.

Lord Lyndhurst.—It would be a species of fraud on him, would it not ?

In reply.—It might or might not be a species of fraud upon him ; but the question is, who is to suffer in respect of that ? This is a question of fact for a jury, not so much a question of law as to the construction of the bond, as a question of fact. But I will take it, that he knew nothing more of the transaction than that he was applied to to execute the bond, and that he gave that joint and several bond as a security for something. Now the bond was given so as to bind the three, and would bind the fourth, provided there was nothing inconsistent in the terms of the bond that it should be so made use of. What are the facts ? The bankers complain that the account is overdrawn ; they represent to the customer that they require a security, and that they desire he will prepare that security ; it is to be observed that the security is not prepared by the bankers or the bankers' attorney ; it is prepared by the customer ; the customer gets it executed by all the parties ; the customer brings it, and immediately has the accommodation which it

was the object of the bond to procure. What then is the presumption? William Fidgeon, the surety, executes the bond; he delivers it to the person for whom he means to be surety, and authorises him to deliver it to the obligee; the principal on delivering it to the obligee does so with reference to the previous treaty and transactions, the creditor having asked for security, and refused to continue his advances unless the debtor gives security for the general balance; the question is, Who is bound by that? Here, upon the face of the bond, they are all equally principals, and for this purpose wherever a man enters into a joint obligation, and enters into that joint obligation in terms not inconsistent with the particular use which is made of it, he is the person who is responsible for the use that one of the obligors may make, and he is bound by the delivery of the bond for that purpose. If we are to receive evidence that one of the apparent principals is a surety, on what principle is evidence to be excluded of the circumstances under which he became surety? and if you come to presumption, you are never to presume fraud; you are to presume that the obligor applied to his friend, his relation, his brother, and said, I want a security to put into the hands of my banker; will you execute it? And he said, I will; there it is; and he executes it. If he does not ask what is the use to be made of it, that is his fault. Is the banker who receives the security bound to go and say to the obligors, I ask you whether you mean so and so, or has he not a right to take it when he applies to the customer for a bond with the additional security of some other person joining in that bond, and the name is added, and the bond executed and

1837.



WALKER

v.

HARDMAN.

1837.


WALKER
v.
HARDMAN.

brought to him in that form, is it not the presumption at law that the one obligor constitutes the other his agent? For the purpose of accommodating the obligee, the bond is given, and for that purpose no Court would ever direct a jury to presume a fraud; to presume that the obligor had been imposed upon; and that the bond being given by the obligor to be used for one purpose, it had been used behind his back for another purpose.

It is not immaterial to observe upon what fell from my learned friend about the situation of William Fidgeon; I never could make out, and I cannot now make out what my learned friend meant by the argument or by the evidence. The evidence of that scene of doubtful or rather suggested intoxication is published, and before your Lordships. Is it intended to be said, that the bond was not a valid and perfectly good bond? That cannot be said. We have a decree that it is so against the parties, and there is no doubt about it. Then why is this to be thrown in? What have we to do with the alleged intoxication, and the conversation which William Fidgeon had with Mr. Brookfield, in which he said he thought he was liable only for a quarter of the sum secured? In judging of a man's acts, you cannot take the particular case of the individual; you cannot enquire whether he was a little intoxicated or a little unwell in consequence of indulgence, and therefore not in a condition to draw a conclusion which another person would have drawn. The first enquiry is whether the bond is binding; it is; then he must be taken to have executed it, not in an utter state of ignorance, as if you had brought a man from Timbuctoo and set him down on the Royal Exchange, and asked him to put his

name to a bond or any other instrument ; you are to take it that the man who executed the bond made the necessary enquiry as to what was the use to be made of it. We lay no stress upon the fact that William Fidgeon was the elder brother of Thomas Fidgeon. Suppose that they are strangers, and that Thomas applied to William to execute the bond? are we to suppose that William desired to remain in a state of ignorance as to the purpose of the bond? What is it that would be fairly presumed? Why, that when William Fidgeon was asked to execute the bond, he would ask for what purpose, and to whom it was to be executed? Any man who signs a bond must be taken to be clothed with the common information of mankind; he cannot afterwards shelter himself from the obvious and necessary consequences of his position by saying, I really knew nothing about it; I was so ignorant, that when I had the conversation with the attorney, I said I thought I should only be called upon for one fourth of it and not the whole; I had not the least idea of the use that was to be made of it. It would be utterly impossible that the affairs of life could be carried on, if arguments of this sort could prevail. A man has no right to put his name and seal to any instrument, and then make a profession of ignorance as to the purpose for which it is used, or that he was in such a state of intoxication that he knew not what he was about. If that were true and available as to the first time the bond was executed, it was not true as to the second. If the three parties to the bond, the customers, were bound by this as a security for a running balance, as a floating security and not for a specific sum, William Fidgeon must be bound in the same man-

1837.


WALKER
v.
HARDMAN.

1837.


WALKER
v.
HARDMAN.

ner; and the Master ought to have found it on all the facts of the case, and not on that insulated fact which does not warrant the conclusion which he professes to have drawn from it. William Fidgeon must be taken to have entered into the same agreement with the other parties; if he did not, it is for him to show it; the obligation is a joint obligation, and whatever binds one binds the rest. There may be a difference as to the evidence by which you get to the effect of it, and the admission of the one after the act may not be good evidence against the other. Where four persons enter into a joint bond, and all the four agree that one of them shall take the bond and make use of it, whatever that one does with reference to the use of the joint obligation is evidence against all the four. The form of sealing and delivering at the very moment is that which gives the bond its legal validity; but for the purpose of giving effect to this bond as a security for the particular or general balance, the period when importance attaches to it, is not when it is sealed or delivered, but when it is put forth to the world. It must be presumed first as matter of law, that all these parties entered into a joint obligation, and whatever be the obligation that attached to it *a priori* is evidence against all, and shows that whatever is the effect of the bond as to one, is its effect as to all. Whether William Fidgeon gave a distinct authority or not, it must be presumed; when the parties enter into a joint contract, and one of them is allowed to make use of it, he is thereby constituted the agent of all, and the use he makes of it binds them all; it is so as a matter of fact quite beside any presumption of law; it must

1837.


 WALKER
 v.
 HARDMAN.

be presumed as a fact that William Fidgeon, when he executed the bond, made all the enquiries that a sane and rational man would make before he put his name to it; and if he had made any enquiry, he must have known that it was asked for by the bankers as a floating security, and not as a security for a specific sum. If it were considered to be a security for a specific sum, for the balance due at that moment, the man stood at once indebted and discharged; the bond could not have any operation for a single moment; it could not remain as an available security, so as to allow the account to go on for five minutes; this fact does not make the argument better, but it must make it more striking. It appears by the account that on the very day when the bond was executed, there came in and were paid out sums to the amount of 1500*l.* or 2000*l.*; it might have been much larger; between the period of the man putting his name and laying down the paper and delivering it up, that supposed account might have been altered by thousands of pounds.

It appears, by their own statement, that in September they would have 6,750*l.* worth of bills to provide for, which may be taken as a fair average (in October it is 9,000*l.*, and in November 5,000*l.*); but, in the meantime, there might be other bills coming due in October and November; so that the effect of this would be, that on the very day, if the bond was executed during the hours of business, the very account, which it was supposed to secure, might be altered to the extent of several thousand pounds. According to this hypothesis, what would be the duty of the bankers from that

1837.

WALKER
v.
HARDMAN.

moment to make the security available? According to the statement of my learned friend, they were to go direct to the counter, and say, stop all payments on account of Lomas and Company, for I have just taken a security which will be of no avail to me unless I immediately carry to the credit of the security all the payments that come in; although the object of giving the bond was to guard against that; its object being not that the account should be stopped, but that the account should go on.

It is argued that we had no equitable relief, and that we could not extend the bond equitably against the surety. We do not want any equitable relief; we come here disclaiming any assistance from a court of equity except to get the assets. But it is further argued, if you come to get the assets, you must do equity. Why, if this was a voluntary bond, as against the obligor, it would be good if there were assets, though not good against a creditor; and when the party goes into equity, merely for the purpose of getting the assets, he has the same rights as if he were at law. That brings us round again to the question, what is the legal construction of the bond? and that brings us again to the question, if it does not appear upon the face of it, what evidence is to be applied, and what is the conclusion to be drawn from the evidence?

This bond constituted a legal debt, which the parties, at any time, had a right to put in suit; and it would be incumbent on those who said there was no debt due at law, to make that out, either by filing a bill for equitable relief, or by putting on the record a plea adapted to the nature of the de-

fence; and in either of those cases it would be incumbent on the other side to show that the bond was discharged; *prima facie* it is a good, available, legal debt. In going into a court of equity to get distribution of the assets, we carry with us all the legal rights which would have belonged to us in a court of law. The question then is, independently of the evidence, what is the conclusion which, in this case, ought to be drawn as to the meaning of this bond? Why, if the meaning is to be varied from its being legal evidence of the debt, it is incumbent on those who seek to advance that proposition to prove it; the authorities, as far as they go, are decidedly in favour of the bond being a continuing guarantee; the case of *Woolley v. Jennings* is direct, positive, and clear; the opinion of the Court there is not pronounced on the particular circumstances of the case, but generally; and it might be inferred from that case, and from all the authorities, that, in order to come to a direct and correct conclusion on a question of this sort, you must not shut your eyes to what are the habits of business and life; you must have your attention directed to what is the object and the intention of the parties; and, in order to get at that, you must look at the situation and the circumstances under which the security was given; and it cannot be denied, if you look at the evidence, that it was the intention, clear and undoubted, on the part of the customer, to give the bond as a continuing guarantee. It is said that the Master has not so found, and that although the exception is over-ruled, it avails us nothing, because the Master has only found the intention and the meaning, as if there

1837.


WALKER
v.
HARDMAN.

Walker v. Hard-

1837.

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WALKER

v.

Vice-Chancellor.

HARDMAN.

10/., was entered into

Thomas and Co., and a per-

man Fidgeon, as surety for

Walker and Co., who were

the sole question is, whether that

so given was, as far as relates to

Fidgeon, a bond for the purpose of secur-

ity then actually due, or whether it was

a security for any future balance that

might exist in the accounts between Henry Lomas

Co. and Messrs. Walker, the bankers.

Now, on the face of the bond there is nothing to show that it was a security for any future balance. On the contrary, the circumstance of the interest being reserved from the date of the bond, would rather lead to the conclusion that it was intended as a security not for any future uncertain balance, but for some debt then existing; because a debt, then existing and carrying interest, would advance as the security itself advanced, viz. with the addition of interest; whereas, if it was a security for a future balance, that balance might be more or less; and it seems inconsistent that the security should, under such circumstances, be a variable security, increasing from time to time. As far as relates therefore to the inference to be drawn from the bond itself, it would appear, that it was rather intended as a security for an existing debt than for a future balance.

But then it is said, that Henry Lomas and Company deposited this bond, and intended it as a

1837.


WALKER
v.
HARDMAN.

were any distinction, either in law or in common sense, between a contract and the meaning of a contract, and as if that which is the meaning of a contract is not according to all good sense and law the contract itself. Having ascertained the meaning of the contract, with respect to the three, that must be the meaning with regard to the fourth, to whom the other three are agents, for whom they were acting, and who must be presumed to be cognizant of the obligation he was entering into, the intent and nature of that obligation, and the necessity that that should be a running guarantee, and not a guarantee for a specific sum only. William Fidgeon executed the bond at the same time as Thomas Fidgeon, and must be presumed, according to the general rule, to have entered into it with the same view.

.With respect to the form, the main question is this: Is the order which was last made, confirming the prior order, that which will obtain the justice of the case? And that brings me to the question, what is the justice of the case? That I apprehend is, that the bankers should have the benefit of this security, according to the legal effect of the document at the time when it was executed. Your Lordships can be at no loss to know from the evidence before you, independently of the legal construction of this instrument, what that legal effect is. It is a question which affects the extended commerce of this country, and the securities given from time to time to an immense amount of property; it affects the security of that property, and it is essential to justice that it should be sent to a jury to be considered.

Lord Lyndhurst.—This case of *Walker v. Hardman*, is an appeal from a decree of the Lord Chancellor, affirming a judgment of the late Master of the Rolls, pronounced when he was Vice-Chancellor. A bond, in the amount of 10,000*l.*, was entered into by the house of Henry Lomas and Co., and a person of the name of William Fidgeon, as surety for the house to Messrs. Walker and Co., who were bankers; and the sole question is, whether that bond which was so given was, as far as relates to William Fidgeon, a bond for the purpose of securing a debt then actually due, or whether it was meant as a security for any future balance that might exist in the accounts between Henry Lomas and Co. and Messrs. Walker, the bankers.

Now, on the face of the bond there is nothing to show that it was a security for any future balance. On the contrary, the circumstance of the interest being reserved from the date of the bond, would rather lead to the conclusion that it was intended as a security not for any future uncertain balance, but for some debt then existing; because a debt, then existing and carrying interest, would advance as the security itself advanced, viz. with the addition of interest; whereas, if it was a security for a future balance, that balance might be more or less; and it seems inconsistent that the security should, under such circumstances, be a variable security, increasing from time to time. As far as relates therefore to the inference to be drawn from the bond itself, it would appear, that it was rather intended as a security for an existing debt than for a future balance.

But then it is said, that Henry Lomas and Company deposited this bond, and intended it as a

1837.

WALKER
v.
HARDMAN.

1837.

WALKER
v.
HARDMAN.

security for a future balance ; and in fact the Master by his report has so found ; and that report has been confirmed ; and from the nature of the transaction it must have been so, because it would have been of no advantage whatever to Messrs. Walker and Co. to have had a security for a mere existing debt, since large advances were made from time to time, and large liabilities incurred on both sides. The amount of the existing debt would therefore be soon wiped off ; and, as between Henry Lomas and Co. and the bankers, I have no doubt that it was intended as a security for any balance that might be found due between them. That is the ordinary nature of transactions between bankers and their customers.

But then the question is, whether that will affect William Fidgeon ; William Fidgeon was a mere surety ; Henry Lomas and Co. might have deposited this bond as a security for a future balance : but by depositing this bond as a security for a future balance, they could not vary the liability of William Fidgeon, unless William Fidgeon gave authority for that purpose. Now, there is nothing to show that William Fidgeon did give authority for that purpose : he was a mere surety. There is no evidence from which you can draw the conclusion, that William Fidgeon ever considered this as a security for a future balance. The observation which I have just made, that it would have been of no use to deposit a bond of this description as security for an existing balance, may weigh against Henry Lomas and Co., who are men of business ; but William Fidgeon, the surety, was totally unacquainted with business. So ignorant was he, that he considered, that because he was one of four

obligors he was liable for only a fourth part of the debt. In fact, all the circumstances show that he, the surety, was totally unacquainted with business ; and therefore no inference of that kind can be drawn against him.

The Master, indeed, has said in his report, that at the time, when this bond was re-executed by William Fidgeon, he did not ask what the amount of the debt was : from which the Master says, he presumes that he considered it a security not for the debt, as it existed at the time when the bond was given, but for a future balance. But, in the first place, I think that is answered by the observation which I have already made, that William Fidgeon was a man totally unacquainted with business : And in the next place it appears to me as natural, supposing the bond to have been given as a security for a future balance, for him to have asked what the amount of the balance was at that time, as for him to have asked the question, supposing the bond to have been given as a security for the debt as it existed at the time when the bond was executed.

I think, therefore, that no fair inference can be drawn from these circumstances against William Fidgeon. It appears to me, that there is no evidence whatever to show that William Fidgeon intended that this bond should be deposited as a security for a future balance ; and as upon the face of the bond it appears only to be a security for an existing debt, I am of opinion that this judgment must be affirmed. I think William Fidgeon cannot be rendered liable for anything more than the debt which existed at the time when the bond was executed. That would of course leave the inquiry,

1837.


WALKER
v.
HARDMAN.

1837.


WALKER
v.
HARDMAN.

whether that debt had been wiped off. The result therefore of the opinion which I have formed is this,—That the judgment of the Lord Chancellor, affirming the judgment of the Vice-Chancellor, be affirmed, with costs.

Lord Brougham. — My Lords, after giving judgment in this case in the Court of Chancery, I had occasion to reconsider the question; and certainly that reconsideration confirmed the opinion I had originally formed.

Judgment affirmed, with costs.

1837.

GORDON

v.

SELBY.

ENGLAND.

(COURT OF CHANCERY.)

WILLIAM GORDON, JOHN HANCOCK, } *Appellants;*
and GEORGE ARUNDALE,

GEORGE SELBY, THOMAS HART, and } *Respondents.*
SAMUEL LEMAGE, - - -

By indenture, dated the 4th of August, 1814, E. T. (then a widow) assigned to T. S. L. a leasehold house at C.; and, by another indenture, on the 6th of August, 1814, she assigned to T. S. L. other leasehold premises. Upon the face of the instruments they appeared to be absolute assignments, upon a nominal consideration; and had no *ad valorem* stamp.

By the draft of a bond, dated on the 11th of October, 1814, it was recited, that D. was indebted to T. S. L. in a sum of 2100*l.*; that she E. T. had assigned the premises as a collateral security for the repayment; and that T. S. L. thereby bound himself, in a penal sum of 2000*l.*, not to sell or charge the property, provided the interest upon the debt was regularly paid; and that he would re-assign the premises upon repayment of the principal and interest by D. or E. T.

In 1816, D. became bankrupt, and T. S. L. laid a case before counsel, in which the debt and securities were stated with a view to be advised whether a proof of the debt could be made without affecting the securities.

The opinion being favourable, proof of the debt was made, and a dividend received, to the amount of 700*l.* In 1824, E. T. joined with T. S. L. in granting a lease of part of premises assigned, at a rent of 100*l.* a year. In this lease it was stated, that the premises were in mortgage to T. S. L., for 1500*l.*, with interest at 5 per cent., and the rent was made payable to T. S. L. until the mortgage should be satisfied. During all this time, E. T. remained in possession of the premises, and paid to

1837.

GORDON
v.
SELBY.

T. S. L., until his death in 1826, 75*l.* a year, being interest at 5 per cent. upon 1500*l.*, to which the debt had been reduced upon account between the parties; and this payment was continued to his widow and executrix until 1831.

In 1832, E. T. having married, together with G. her husband, filed a bill, stating a case of imposition and undue influence exercised over her by T. S. L., and fraud in obtaining the assignment without consideration, and claiming the premises as upon a resulting trust. The bill also made an alternative case, representing that T. S. L., having obtained the assignment, insisted upon retaining the property as a security for the debt owing to him by D. for a larger sum than he was intitled to, or than was intended to be secured.

Upon these grounds the bill prayed a re-assignment and account of the rents received; or if a case of mortgage for collateral security should be made out, then the bill prayed an account and redemption.

The answer insisted upon a case founded on the facts as above stated, and as appearing by the documents proved in the cause, showing the real nature of the transaction.

The bill was twice amended after the coming-in of the answer, and after inspection of the documents; but the amended bill raised no case to impeach or to meet the effect of the documents. An objection was taken to the admission of the draft bond as evidence; but it was received. It was also proved, that E. T. was an active and intelligent woman of business; that she had in conversation frequently stated, that she had assigned the premises as a security for the debt of D., and paid the interest, 75*l.* per annum, upon 1500*l.* To the applicability of this evidence, it was objected, that no consideration could be shown different from that which appeared upon the face of the instrument; and that parol evidence was inadmissible to show a qualified estate in land.

By the decree in the Court below, it was declared, that the assignment was valid as a security for 1500*l.*; and the bill was dismissed, except so far as it prayed redemption; and an account, &c., was directed.

On appeal, this decree was affirmed.

ON the 28th day of July, 1832, the Appellants and Mrs. E. Gordon, then the wife of the Appellant William Gordon, (formerly Elizabeth Taylor,

who has since died,) filed their original bill in the Court of Chancery, against Mrs. Maria Lamage, who is also since deceased, and the Respondent George Selby, for the purpose of setting aside certain assignments and securities upon the ground of fraud. That original bill was twice amended; first, after the Defendants had answered under an order of the 14th day of February, 1833, and once again under an order of the 6th day of June, 1834, after the bill as first amended had been answered, and after production and inspection of the deeds of assignment and other documents in the possession of the Defendants, who were ordered to produce the same. The bill, as thus amended, stated, that in August, 1814, the said Elizabeth Taylor was possessed of and entitled to several leasehold premises: That for some time previously thereto, the said T. S. Lamage had become intimately acquainted with the said Elizabeth Taylor, and her family; and that great intimacy subsisted between her and the said T. S. Lamage, and that he had very great influence over her, and also over Lydia Mason, widow, her daughter by the said Joseph Taylor: And that the said T. S. Lamage was acquainted with the amount and situation of her property; and that he acted in the management thereof: And that he had also at the same time divers dealings with John Davies, who was married to a daughter of the said Elizabeth Taylor.

That in or about the month of August, 1814, the said T. S. Lamage persuaded the said Elizabeth Taylor to assign to him, in trust for herself, absolutely, three leasehold messuages or tenements in Great and Little Wilde Street, Lincoln's Inn Fields, and a certain messuage or tenement in

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELEY.

Pleasant Row, Camden Town; and that the said Elizabeth Taylor did not consult any professional or other adviser relative to such assignment: And that the said Thomas Samuel Lamage caused certain assignments of the said premises to be prepared by one Mr. Shorter, since deceased, an attorney in the Temple, with whom the said Thomas Samuel Lamage was well acquainted, but who was a stranger to the said Elizabeth Taylor: And that the said T. S. Lamage caused the said assignments to be prepared by the said Mr. Shorter, from instructions given by him, the said T. S. Lamage, and not from any instructions given by the said E. Taylor: That the said E. Taylor executed the same, according to the directions of the said T. S. Lamage, and without reading the same, or having the same read over to her: That no draft or copy of either of the said indentures was ever submitted for perusal to the said Elizabeth Taylor, or any person on her behalf; and that no consideration of any kind was ever at any time before, or at, or after the execution of the said indentures or deeds, or either of them, paid or given by or on account of the said Thomas Samuel Lamage, to or on account of the said Elizabeth Taylor, and that she had no other information as to the nature, purport, and effect of the said deeds or indentures than such as was given to her by the said Thomas Samuel Lamage; and that she had never seen the said indentures, or either of them, since she executed the same as aforesaid. That soon after the said Elizabeth Taylor had executed the said indentures, the said Thomas Samuel Lamage alleged that the said John Davies was indebted to him in the sum of 500*l.*, and that

he had been induced to give credit to the said John Davies because he was the son-in-law of the said Elizabeth Gordon, and that therefore he was entitled to consider the said several leasehold premises so assigned to him, as vested in him by way of security for the debt of 500*l.*, due to him by the said John Davies, although in fact the said Elizabeth Taylor never did by any deed, instrument, or writing, make herself liable to the said Thomas Samuel Lamage, or undertake to pay the said alleged debt. That the said Elizabeth Taylor never was in any manner bound at law or in equity to make good the said debt alleged to be due by the said John Davies. That the said Thomas Samuel Lamage not only alleged that he was entitled to hold the said several leasehold premises as a security for the said debt, or alleged debt of 500*l.* due to him by the said John Davies, but also alleged that he was fully entitled to sell all the said leaseholds without the concurrence of the said Elizabeth Taylor.

That in November, 1816, a commission of bankrupt was issued against the said John Davies, and that the said Thomas Samuel Lamage proved a debt under the said commission, to the amount of 2150*l.*, and received a dividend in respect thereof; and that the said debt so proved by him included the said 500*l.*, for which he alleged that the said Elizabeth Taylor had become surety. That the said Thomas Samuel Lamage received the sum of 700*l.* and upwards as the amount of such dividends: That in November, 1818, he alleged to the said Elizabeth Taylor, that the said John Davies remained indebted to him in the sum of 1300*l.* and upwards, and also represented to the said Elizabeth

1837.

GORDON

v.

SELBY.

1837.

GORDON
&
SELBY.

Taylor, that as the said leaseholds were vested in him as aforesaid, he the said Thomas Samuel Lamage was entitled to hold the same as a security for the said sum of 1300*l.*, and interest for the same; and also represented to her that he would sell the said leaseholds for his own benefit, and was entitled so to do, and to retain the money to be produced by sale in payment of the said sum of 1300*l.*, which he alleged to remain due to him from the said John Davies: That the said Thomas Samuel Lamage at the same time stated to the said Elizabeth Taylor that he would refrain from selling the said leaseholds if the said Plaintiff would pay to him interest on the sum of 1500*l.*, which he said was the amount then due for principal and interest in respect of the said sum of 1300*l.*: That the said Thomas Samuel Lamage then had, and exercised, unbounded influence over the said Elizabeth Taylor, and represented to her that it was only by agreeing to pay such interest that she could prevent the necessity for the sale of the said leaseholds; and that he also declared and promised that if she would pay such interest, he would bind himself not to sell the said leasehold messuages or tenements and premises: That the said Elizabeth Taylor, in order to prevent the sale by the said Thomas Samuel Lamage of the said leaseholds, paid him the sum of 75*l.* in respect of interest on the said alleged debt of 1500*l.* due from the said John Davies to the said Thomas Samuel Lamage, and continued from time to time to pay the said sum of 75*l.* *per annum* to the said Thomas Samuel Lamage, in respect of interest, to prevent him from proceeding to sell the said leaseholds.

That the said Thomas Samuel Lamage, from the date of the said indenture of assignment, entered into the possession and into the receipt of the rents and profits of all the said leaseholds, and that the rents and profits thereof received by him amounted to a very large sum of money, and to much more than the sum of 75*l. per annum* ; but that he represented to the said Elizabeth Taylor that the rents and profits so received by him from the month of November, 1818, amounted to no more than the sum of 75*l. per annum*, and were just enough to keep down the interest on the said sum of 1500*l.* due to him by the said John Davies, which the said Elizabeth Taylor was, as he alleged, bound to keep down in order to prevent him from selling the said leaseholds: That the said Thomas Samuel Lamage, from time to time up to the time of his death, wrote out or stated accounts or memorandums, which he delivered to the said Elizabeth Taylor, wherein he gave her credit for 75*l. per annum*, as the rent received by him in respect of the said leaseholds, and debited her with the said sum of 75*l. per annum*, in respect of such interest as aforesaid. That the influence and power which the said Thomas Samuel Lamage had over the said Elizabeth Taylor, and her family, by reason of his connection with her said daughter Lydia Mason, prevented the said Elizabeth Taylor from consulting any professional adviser as to the matters aforesaid, and from taking any advice as to how she should act. That the said Thomas Samuel Lamage continued in possession and in the receipt of the rents and profits of all the said leaseholds up to the time of his death ; and that he made his will, and appointed his wife, Maria Lamage, and the Respondent George Selby,

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

executrix and executor of his said will ; and that in the year 1826 he died, and that the said Respondent, George Selby, and the said testator's widow, Maria Lamage, duly proved the same : That they had possessed themselves of the personal estate and effects of the said testator Thomas Samuel Lamage, more than sufficient for payment of his just debts and funeral and testamentary expenses. That after the death of the said Thomas Samuel Lamage, the said respondent, George Selby, and the said Maria Lamage, his widow, as such his executor and executrix, entered into the possession and into the receipt of the rents and profits of all the said leaseholds ; and that they claimed to be entitled to the said sum of 75*l.* for such interest as aforesaid, and claimed also to be entitled to set off the rents, so received by them for interest on the said alleged debt, due by the said John Davies to the said Thomas Samuel Lamage. That the said testator, Thomas Samuel Lamage, brought, or caused, great shame and sorrow to the said Elizabeth Taylor, and her family, by his connection with her said daughter, Lydia Mason, and by his conduct towards her ; and that divulging the said connection and conduct of the said Thomas Samuel Lamage would have ruined and disgraced the said Elizabeth Taylor and her children, under the circumstances in which they then were ; and that she could not have obtained advice relative to the matters aforesaid without divulging or disclosing the said connection of the said Thomas Samuel Lamage with her said daughter.

That the said Plaintiff, Elizabeth Taylor, continued a widow until the month of May, 1829, when she intermarried with the Appellant, William

Gordon ; and that previously to the said marriage, a memorandum of agreement, bearing date on or about the 5th day of May, 1829, and made between the Appellant, William Gordon, of the first part, the said Elizabeth Taylor, of the second part, and the Appellants, John Hancock and George Arundale, of the third part, was signed by the said parties, whereby it was agreed, that all the estate and property of the said Elizabeth Taylor should be vested in the Appellants, John Hancock and George Arundale, upon trust, to permit the said Elizabeth Taylor to receive the rents and annual proceeds thereof for her separate use, during her life ; with power for her to dispose of such estate and property, notwithstanding her intended marriage : and, in default of any disposition thereof being made by her then, in trust, to divide the same amongst her next of kin : That for some time after the said marriage, the said Elizabeth Taylor, then Elizabeth Gordon, continued unwilling to disclose the matters aforesaid ; but that, in or about the year 1831, the Appellants having made inquiries as to the said leaseholds, and as to the manner and purpose for which the same had been assigned to the said Thomas Samuel Lamage, the various matters therein-before mentioned were disclosed to them. That the execution of the said indentures of assignment, of the 4th and 6th days of August, 1814, by the said Elizabeth Gordon, was unduly and improperly obtained, by the said Thomas Samuel Lamage, from her ; and that a fraudulent and improper use was made by the said Thomas Samuel Lamage of the said assignments, and of the possession of the said leaseholds thereby obtained by him : and that the said

1837.

GORDON,

v.

SELEY.

1837.

GORDON

v.

SELBY.

Plaintiffs were entitled to have from the said Maria Lemage, and the Respondent, George Selby, an absolute reconveyance of all the said leaseholds on to have the said indentures of assignment delivered up to be cancelled; and were also entitled to have all sums received by the said Thomas Samuel Lemage during his life, and by the said Respondent, George Selby, and Maria Lemage since his death, in respect of the rents and profits of the said leaseholds refunded and repaid to them.

The bill, as so amended, amongst other things charged, that if the said Elizabeth Gordon ever made herself liable to the said Thomas Samuel Lemage, or became surety for any debt due from the said John Davies to the said Thomas Samuel Lemage, her liability as such surety was discharged by subsequent dealings and transactions between the said John Davies and Thomas Samuel Lemage, to which she the said Elizabeth Gordon was no party; and in particular, that in or about November, 1814, the said Thomas Samuel Lemage, without the knowledge or concurrence of the said Elizabeth Gordon, caused the said John Davies to give to the said Thomas Samuel Lemage a warrant of attorney for 2100*l.*, including the amount for which the said Elizabeth Gordon was alleged to be surety as aforesaid: and that the said Thomas Samuel Lemage then cancelled a previous warrant of attorney, executed by the said John Davies to him for a smaller sum of money, in respect of part of which the said Elizabeth Gordon is alleged to have been surety to the said Thomas Samuel Lemage.

The bill further charged that no sum was then due from Elizabeth Gordon to Maria Lemage and

George Selby, or either of them, in respect of any debt due from John Davies to Thomas Samuel Lamage, or in respect of any other matter; but that, on the contrary, a large sum of money, to the amount of 400*l.* or thereabouts, was due from Maria Lamage to Elizabeth Gordon, on the security of her promissory notes, or to the Appellants, John Hancock and George Arundale, as such trustees as aforesaid, in respect of monies paid by the said Elizabeth Gordon, to or for the use of the said Maria Lamage since the death of the said Thomas Samuel Lamage; and that, in fact, no debt was then due from the said John Davies to the said Thomas Samuel Lamage, or to the said Maria Lamage and George Selby, his executors: and that, although the said John Davies was at the time of the said commission of bankruptcy being issued against him indebted to the said Thomas Samuel Lamage, in a sum of 1500*l.* or thereabouts, yet that such debt was not justly due and payable to the said Thomas Samuel Lamage, for that, by the terms on which such debt was contracted, a rate of interest exceeding 5*l.* per cent. per annum was contracted to be paid for the same; and that, in fact, the said John Davies did pay to the said Thomas Samuel Lamage interest on such debt, at the rate of from 8*l.* to 15*l.* per cent. per annum; and that no debt was contracted by the said John Davies to the said Thomas Samuel Lamage at any time subsequently to the said commission of bankruptcy; and that the said Maria Lamage, since the death of her said husband, had borrowed from the said Elizabeth Gordon the sums of 200*l.* and 150*l.*; which were still due to the said Elizabeth Gordon, or her said trustees, with a large arrear of interest

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

thereon ; and that the said Maria Lamage, well knowing that no sum was due to her in any manner from the said Elizabeth Gordon in respect of the said pretended guarantee for the debt of the said John Davies, or otherwise, gave to the said Plaintiff her promissory notes, or other securities, for the said sums of 200*l.* and 150*l.* ; and that the Respondent, George Selby, was an attorney or solicitor, and was the confidential legal adviser of the said Thomas Samuel Lamage ; and that he the said Thomas Samuel Lamage employed another professional person (that is to say), the said Mr. Shorter, and did not employ him the said George Selby to prepare the said indentures of the 4th and 6th days of August, 1814, or to do any other act in respect of the said leaseholds although he the said George Selby was consulted and employed by the said testator, Thomas Samuel Lamage, relative to his the said testator's own affairs.

The bill prayed, that it might be declared that the said indentures of the 4th day of August, 1814, and the 6th day of August, 1814, were unduly and improperly obtained from the said Mrs. Elizabeth Gordon, and that the same might be decreed to be delivered up to the said Appellants and Mrs. Elizabeth Gordon, to be cancelled ; or that the said Mrs. Maria Lamage and George Selby, and all other necessary and proper parties, might be decreed to join in re-assigning the said premises to the Appellants, John Hancock and George Arundale, as such trustees under the said memorandum of agreement of the 5th day of May, 1829, as therein before mentioned, free from all incumbrances created by the said Mr. Thomas Samuel Lamage, or any other person or persons claiming

under him ; and that it might be declared, that if the said Mrs. Elizabeth Gordon ever became or made herself liable as surety for any debt due from the said John Davies to the said Mr. Thomas Samuel Lamage, that such liability was discharged by the subsequent dealings and transactions between the said Mr. John Davies and the said Mr. Thomas Samuel Lamage, to which the said Mrs. Elizabeth Gordon was no party, and particularly by the said warrant of attorney of the 19th day of November, 1814 : and that the said Mrs. Maria Lamage and George Selby might be decreed to deliver up to the Appellants, and the said Mrs. Elizabeth Gordon, all the leases and other title-deeds, instruments, muniments, and writings in their possession, custody or power, relating to the said leaseholds or any part thereof ; and that an account might be taken by the Court of all the rents and profits of the said leasehold property received by the said Mr. Thomas Samuel Lamage in his lifetime, and by the said Mrs. Maria Lamage and Mr. George Selby since his death, or which, without the wilful neglect or default of the said Mr. Thomas Samuel Lamage, Mrs. Maria Lamage, and Mr. George Selby, might have been received : and that the said Mrs. Maria Lamage and Mr. George Selby might be decreed to pay to the Appellants, Mr. John Hancock and Mr. George Arundale, as such trustees, the amount of the rents so received ; and that the said Mrs. Maria Lamage and Mr. George Selby might admit assets of the said Mr. Thomas Samuel Lamage, sufficient to pay the amount of such rents, or that an account might be taken in the usual manner of the personal estate and effects of the said testator, Mr. Thomas

1837.

GORDON

v.

SELBY.

1837:

GORDON

v.

SELBY.

Samuel Lamage, possessed or received by the said Mrs. Maria Lamage and Mr. George Selby, or which, without their wilful neglect, might have been received, and that the same might be applied in a due course of administration, and in payment of what should be found due to the said Appellants: and if Mrs. Elizabeth Gordon was justly bound to make good any sum of money to the said Mrs. Maria Lamage and Mr. George Selby, in respect of any debt due from the said Mr. John Davies to the said Mr. Thomas Samuel Lamage, then that an account might be taken of what was due from the said Mrs. Elizabeth Gordon, giving credit for all sums received by the said Mr. Thomas Samuel Lamage, or by the said Mrs. Maria Lamage and Mr. George Selby, since his death, in respect of the said rents; and also giving credit for all sums due to the said Mrs. Elizabeth Gordon from the said Mrs. Maria Lamage; and that, upon payment of what, if any thing, should be found due, after giving such credits, the said Mrs. Maria Lamage and Mr. George Selby might be decreed to reconvey the said leasehold property to the Appellants, Mr. John Hancock and Mr. George Arundale, as such trustees: and that the said Mrs. Maria Lamage and Mr. George Selby might be restrained, by the injunction of the Court from receiving the rents of the said leasehold property; and that some proper person might be appointed to receive them, and for general relief.

The Defendant, Mrs. Maria Lamage, appeared, and answered the original bill, and the first amendment thereof; but died before it was amended the second time.

The Respondent, George Selby, also appeared

to, and answered the original bill, and the first amendment thereof.

The answers of the several Defendants stated a case in substance, as follows:— That in the month of July, 1814, Mrs. Elizabeth Taylor, then a widow, living in or near Saint Martin's Lane, and who, having afterwards become Mrs. Gordon, was one of the Plaintiffs in the original bill filed in the said suit, was possessed of certain leasehold premises, consisting of a flatting-mill, some houses, stables, and other premises, situate in Great and Little Wild Street, Lincoln's Inn Fields, and of a house and premises situate in Pleasant Row, Camden Town, under separate leases, for terms which were still unexpired: that one of Mrs. Taylor's daughters was married to Mr. John Davies, a carpenter, living in Saint Martin's Lane, to whom Mr. Thomas Samuel Lamage, at the time above mentioned, lent 1600*l.* upon his (Davies's) warrant of attorney: that in the same month of July, 1814, Mr. Davies was indebted to Mr. Jones, a timber-merchant, to the amount of about 3000*l.*, the immediate payment of which debt was required by the said Mr. Jones; and Davies, being unable to meet this demand, requested time for payment, which Mr. Jones consented to allow him as to 2000*l.*, part of his debt, on condition that Davies paid him 1000*l.* down, and accepted bills of exchange, payable at distant dates, for the balance: that Davies, being unable to raise such sum of 1000*l.* from his own resources, applied to his mother-in-law, then Mrs. Taylor, to assist him: that Mrs. Taylor, who was desirous of assisting Davies, but who was also unable to advance the requisite sum, applied to Mr. Thomas Samuel Lamage, with whom she had for

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

several years been on intimate terms, and requested him to advance the sum which Davies required: that Mr. Lamage declined to do this; and his own debt from Davies being considerable, and having no other security for it than the warrant of attorney which he then held, (and which, from the representation Davies made of his circumstances, was a very insufficient one,) stated his determination to be, that he would not advance any sum whatever unless a satisfactory security should be given to him, as well for the 1600*l.* then due to him, as for any other sum which he should lend to Davies at Mrs. Taylor's request: that Mrs. Taylor, being very anxious to extricate Davies from the difficulties which then beset him, and Davies's want of money extremely urgent, they, after having deliberated upon Mr. Lamage's statement, made a proposal to him, that if he would lend Davies the further sum of 1000*l.*, which would make his whole debt 2600*l.*, Davies would sell and assign to him, for the sum of 500*l.*, the equity of redemption, to which Davies was then entitled, in certain leasehold premises in Castle Street, and Hunt's Court, Leicester Square, and which were then charged with a mortgage to a Mr. Tripp, for 800*l.* and interest; and that Mrs. Taylor would assign to Mr. Lamage her leasehold property in Great and Little Wild Street, Lincoln's Inn Fields, and in Pleasant Row, Camden Town, for securing to him the repayment of 2100*l.*, which would be the full amount then due to him, after deducting the price of the equity of redemption, with interest on such sum of 2100*l.*, at the rate of 5*l.* per cent. per annum: that Mr. Thomas Samuel Lamage was induced, from his desire to oblige Mrs. Taylor, to consent to this

proposition ; and accordingly, in the month of July, 1814, he advanced such sum of 1000*l.* to Mr. Davies, at Mrs. Taylor's request ; and Davies, in consideration of 500*l.*, part thereof, thereupon assigned to Mr. Lamage the equity of redemption in the said premises in Castle Street, and Hunt's Court, Leicester Square ; and Mrs. Taylor, by an indenture of assignment, dated the 4th of August, 1814, assigned to Mr. Lamage her leasehold house and premises in Pleasant Row, Camden Town ; and by another indenture, dated the 6th of August, 1814, she assigned to Mr. Lamage her flatting-mill, houses, and other premises in Great and Little Wild Street, Lincoln's Inn Fields, for the residue of the several terms therein, and subject to the rent and covenants under which the said leasehold premises were held by her : that for some reason, which it was not possible, from the distance of time, and by reason of all the parties to the transaction being dead, to explain, both the last-mentioned assignments were upon the face of them absolute assignments, and did not purport to be securities for money, and redeemable on payment of the 2100*l.* and interest, as the same were intended to be, and as they were always known and considered by the parties to be : that in order, however, to prevent the absolute effect of the assignments, and to evidence the true intent of them, Mr. Lamage executed a bond to Mrs. Taylor, dated the 11th of October, 1814, a draft of which bond (the original not being forthcoming) was produced, on the hearing of the said suit before the Master of the Rolls ; whereby, after noticing that the said Mr. Davies owed Mr. Lamage 2100*l.*, and that the said Mrs. Taylor had assigned to him all her said

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELEY.

leasehold property in Great and Little Wild Street, and in Pleasant Row, Camden Town, as a collateral security for payment thereof, the said Mr. Lamage bound himself in the penal sum of 2000*l.* not to sell or in any manner charge the said leasehold property during Mrs. Taylor's life, provided he would regularly paid the interest agreed on the said sum of 2100*l.*; and also, that he would re-assign to her all her said leasehold property, free from all incumbrances, in case she or the said John Davies should repay to Mr. Lamage the 2100*l.*, with interest, as therein mentioned: that at the same time, and as an additional or collateral security for the said sum of 2100*l.*, and interest, the said John Davies executed his warrant of attorney to the said Mr. Lamage, dated the 19th of October, 1814, defeasible, on payment by the said John Davies to the said Thomas Samuel Lamage, of the said sum of 2100*l.*, with interest thereon from the 29th day of September then last past; and thereupon the former warrant of attorney, dated the 4th of July, 1814, was cancelled or destroyed: that in the month of November, 1816, a commission of bankruptcy was issued against John Davies; and Mrs. Taylor as well as Mr. Lamage were desirous that the amount of the debt due from Davies should be proved under the commission, for the purpose of reducing the amount of the debt secured by the assignments before stated, and which would be obviously for the benefit of Mrs. Taylor: that some doubts were entertained by Mr. Lamage as to whether he could do so without prejudicing or giving up his security on the said leasehold property assigned to him by Mrs. Taylor; and under these circumstances, he caused a case, in which the several circumstances above stated,

respecting the said debt and the securities were detailed, to be laid before the late Mr. Cooke, an eminent bankruptcy lawyer, for his opinion thereon; and Mr. Cooke's opinion being, that Mr. Lamage was entitled to prove his debt, without prejudice to the securities executed by Mrs. Taylor, Mr. Lamage, on the 25th of January, 1817, proved, under the said commission of bankruptcy, a debt of 2140*l.* 19*s.* for principal and interest, due upon his aforesaid debt of 2100*l.*, up to the date of the said commission; and in such proof stated that he had no security for the same, except the last-mentioned warrant of attorney, and except the aforesaid assignments of the 4th and 6th of August, 1814: that the said Mr. Lamage afterwards received dividends, on such proof, to the amount of 700*l.*, or thereabouts, which he applied in relief and diminution of the debt which had been secured to him by Mrs. Taylor, and for her benefit; for after he had received such dividends, he came to an account with Mrs. Taylor of what remained due to him on the security of her said leasehold property, so assigned to him by the said indentures of the 4th and 6th of August, 1814, respectively; and the balance so due to him was thereupon computed, and finally settled between them, to amount to the sum of 1500*l.*: that the accounts being so settled, Mr. T. S. Lamage thereupon executed another bond to the said Mrs. Taylor, in substitution of the former bond, and for the purpose of enabling her to redeem her said leasehold property on payment of the sum of 1500*l.*; to which sum the amount of her security was reduced, with interest thereon at the rate of 5*l.* per cent. per annum: that in pursuance of the arrangement which had been entered into, and in

1837.



GORDON

v.

SELBY.

1837.

GORDON

v.
SELBY.

accordance with the real intent and meaning of the said securities, notwithstanding the absolute form of the said assignment, Mrs. Taylor was permitted Mr. Lamage to remain in the possession or in the receipt of the rents of the said leasehold property which had been so assigned to him; and she collected and received such rents herself, or by some person as her agent; and from the time of such last-mentioned settlement of accounts, she paid to Mr. Lamage 75*l.* a year, for interest on the said debt of 1500*l.*, at the rate of 5*l.* per cent. per annum, down to the time of his death; and after his death she continued the payment of such annual interest to Mrs. Maria Lamage, his widow and executrix, to the 29th of September, 1831: that in the month of June, 1824, the said Mrs. Taylor, and the said Mr. Lamage, joined in granting a lease of the mill, houses, and premises, comprised in the said indenture of assignment of the 6th of August, 1814, to one Thomas Cholerton, for a term of twenty-one years, at a rent of 100*l.* a year; in which lease it is stated, that the said premises were then in mortgage to the said T. Samuel Lamage, to secure the said sum of 1500*l.* and interest, at the rate of 5*l.* per cent. per annum; and such rent is made payable to the said Mr. T. S. Lamage, his executors, administrators, and assigns, so long as such mortgage should remain unsatisfied; and, after the payment and satisfaction thereof, then to the said E. Taylor, her executors, administrators, and assigns: that in the month of September, 1828, and after the death of the said Mr. T. S. Lamage, the said Mrs. Maria Lamage, as his widow and legatee, and the said Elizabeth Taylor, joined in demising the messuage and premises in Great Wild Street, comprised in

the said assignment of the 4th of August, 1814, to one James Forsyth, for a term of twenty-one years, from the 23d of May, 1827, at the rent of 35l. a year, to the said Maria Lamage, her executors, administrators, and assigns; and the said Mrs. Taylor not only never complained of or objected to the several arrangements and dealings with the said leasehold property before mentioned, but she continued on the most friendly footing with the said Mr. Lamage until his death, and visited and attended him in his last illness, and continued on the same friendly and intimate terms with his widow, the late Mrs. M. Lamage, until the said Mrs. Taylor married the Appellant, William Gordon: that on the 23d of February, 1825, Mr. T. S. Lamage made his will, whereof he appointed Mrs. Maria Lamage, then his wife, and the Respondent George Selby, his executrix and executor, and died in December, 1826, without having revoked or altered his will, which was proved by Mrs. M. Lamage, and the Respondent George Selby; who, having thereby become his legal personal representatives, became also entitled to the said leasehold property mentioned in the said deeds of assignment; and, under the bequests contained in such will, the said Maria Lamage became entitled to the said debt of 1500l., and the interest thereon, and to the benefit of the assignments by which the same were in manner aforesaid secured: and that in the month of May, 1829, the said Mrs. E. Taylor, being then eighty-one years of age, married the Appellant William Gordon.

To this answer a replication having been filed, and the suit being at issue, on the 17th of February, 1833, the Plaintiff, Elizabeth Gordon, died, where-

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

upon in the month of April, 1833, the Appellants filed their bill of revivor in the Court of Chancery against Mrs. Maria Lamage and the Respondent George Selby, stating the death of Mrs. Elizabeth Gordon, and her will, whereby she devised and bequeathed her said leasehold property to the Appellant, Mr. William Gordon, and appointed him her sole executor; and that he had duly proved her will, and had thereby become her legal personal representative; and praying that the said suit and proceedings might stand revived against the said Mrs. Maria Lamage, and the Respondent George Selby, and that the Appellant might have the same relief against them that they might have had in case the said Mrs. Elizabeth Gordon had not died.

Mrs. Maria Lamage, and the Respondent Mr. George Selby, accordingly appeared to the bill of revivor, and the said suit and proceedings were accordingly revived; but in the month of January, 1834, Mrs. Lamage died, having made her will, dated in February, 1831, whereby she appointed the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, executors; and the suit having thereby again become abated, the Appellants, in the month of April, 1834, filed their bill of revivor and supplement against the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, stating the death of Mrs. Maria Lamage, her will, and the probate thereof by the last-named Respondents, and praying that the suit and proceedings might stand revived against the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, and that the Appellants might have the same relief against the Respondents last-named as they might have had if the said Mrs. Maria Lamage had not died; and

that the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, might admit assets of Mrs. Maria Lamage, sufficient to answer the Appellants' demand in that suit, or that in default thereof, the usual accounts might be taken, under the direction of the Court, of the personal estate and effects of the said Mrs. Maria Lamage, possessed or received by the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage.

To this bill of revivor and supplement the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, appeared, and in February, 1834, put in their answers thereto, thereby admitting the death of Maria Lamage, and her will; and that they had proved the same in the proper Ecclesiastical Court, and had thereby become, and were, her legal personal representatives.

The bill having afterwards, by an order dated the 6th of June, 1834, been further amended by the Appellants, the Respondent, George Selby, put in his answer thereto; and the cause being at issue, witnesses were examined on each side, and the cause came on for hearing on the 3d, 7th, and 8th days of July, 1835, before the Master of the Rolls.

Upon the hearing of the cause the Appellants put in as evidence, amongst other things, a draft of the case before mentioned to have been submitted to Mr. Cooke, with a copy of his opinion thereon, and the proceedings under the commission against John Davies, with the proof of debt made by Thomas Samuel Lamage, and read, among others, the deposition of John Davies, who stated that Mrs. Gordon, at his request, agreed to become surety to Mr. Lamage for 500*l.*, but no more.

1837.

GORDON

v.

SELBY.

1837.

GORLON

v.

SELBY.

The Respondents put in and relied on the documents referred to in their respective answers, including the settled account by which the debt was reduced to 1500*l.*; and read the depositions of the witnesses examined by them, except the deposition of Lydia Hart,—whose evidence being objected to upon the ground that she had an interest in the subject of the suit, was not received.

Among other matters given in evidence on the part of the Appellants, the copy or draft of the case and opinion, and of the bond of the 11th of October, 1814, were proved to be in the handwriting of Mr. Shorter, who, at the times to which those documents relate, was the solicitor of Mrs. Gordon and of Mr. Lamage; and Earle, the witness by whom this fact was proved, stated that he had heard, in a conversation which took place between Mr. Thomas Samuel Lamage and Elizabeth Gordon, that the said draft bond was drawn for the purpose of a bond being given by Thomas Samuel Lamage to Elizabeth Gordon, in order that she might have the property in Wild Street, and which she had assigned to Thomas Samuel Lamage as a security for the money advanced by him to John Davies, re-assigned to her when the money advanced by him should be repaid: upon the Respondents putting in such draft bond, which was referred to in the deposition of the last-mentioned witness, the same was objected to on the part of the Appellants: it was argued on the part of the Appellants, that the bond could not be looked at or received in evidence at all, it not being an original document, and no ground having been properly laid for its reception as secondary evidence; but it was not tendered by the Respon-

dents as evidence of the contents of the bond, but as the paper respecting which Elizabeth Gordon, then Elizabeth Taylor, had made and heard the statements deposed to by the last-mentioned witness, and as one circumstance among others, proving and corroborating the fact that she had admitted the purport and effect of the said assignments to be such as they were stated to have been, and on that ground only the draft bond was permitted to be received in evidence.

Upon the production of the assignments, it appeared that the indenture of the 4th of August, 1814, was made between the Plaintiff, Elizabeth Gordon (then Elizabeth Taylor, widow), of the one part, and Thomas Samuel Lamage (therein described as of Upper Smith Street, Northampton Square, in the parish of Saint James, Clerkenwell, in the county of Middlesex), of the other part; and that the messuage or tenement and premises at Camden Town were thereby in consideration of the sum of 10s. therein expressed to have been paid by Thomas Samuel Lamage to Elizabeth Gordon, absolutely assigned by Elizabeth Gordon to Thomas Samuel Lamage. The indenture was stamped with a stamp denoting the payment of the proper amount of duty which an assignment of that nature would require, but not properly stamped as an assignment by way of mortgage or security. It was executed in the presence of and attested by Stephen Shorter alone. No receipt or acknowledgment for any money or other consideration appeared thereon. Immediately after the signatures of Mrs. Taylor and Mr. Shorter, a strong line was drawn in ink, and a deed written thereunder, dated the 2d day of December, 1816, made

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELEY.

between the said Thomas Samuel Lamage of the one part, and Lydia Mason (therein also described as of Upper Smith Street, Northampton Square aforesaid), of the other part; whereby it appeared that Thomas Samuel Lamage, in consideration of 15*l.*, therein expressed to have been paid to him by Lydia Mason, absolutely conveyed the premises assigned by the indenture of the 4th day of August, 1814, to Lydia Mason, her executors, administrators, and assigns. This instrument also was stamped with a 10*s.* stamp, and appeared also to have been executed by Thomas Samuel Lamage in the presence of, and attested by, Stephen Shorter only. A receipt for the 15*l.* consideration-money was also written, signed, and attested, and the whole of this deed of 2d December, 1816, was then cancelled by lines drawn through each word; and the following words, viz. “cancelled with consent of both parties, December 17. 1817,” were written thereunder in the handwriting of Thomas Samuel Lamage; but these words are not signed or witnessed by any person.

Upon the production of the other indenture of the 6th day of August, 1814, it appeared that the messuages or tenements and premises in Great and Little Wild Streets, Lincoln’s Inn Fields, were in like manner absolutely conveyed by Elizabeth Gordon to Thomas Samuel Lamage, for an expressed nominal consideration of 10*s.* only. The stamp upon it was merely the proper stamp where there was a nominal consideration. It had no *ad valorem* stamp, or such as is proper for a conveyance, in consideration of the payment of any large sum of money, or for the purpose of a mortgage or security. It appeared to be executed by both

parties in the presence of, and attested by, Stephen Shorter; and no receipt for any valuable or other consideration was written or indorsed thereon.

Upon this indenture also was indorsed another deed of assignment, dated the 2d day of December, 1816, whereby Thomas Samuel Lamage absolutely conveyed and assured the last-mentioned premises to Lydia Mason for a nominal consideration only. This instrument also appeared to have been stamped, and executed by Thomas Samuel Lamage in the presence of Stephen Shorter; but the stamp and the seal had been torn off, the deed had been cancelled, by drawing lines through each word, and an endeavour had been made to erase the attestation and the signatures of Thomas Samuel Lamage and Stephen Shorter; but these signatures, and the words "cancelled by consent of both parties, December 17. 1817," written by Thomas Samuel Lamage, but unsigned and unattested, were partially visible.

The depositions read upon the hearing were as follows: —

John Davies, one of the Appellants' witnesses, proved that the draft case which had been produced and deposited in Court, by the Respondent George Selby, was in the handwriting of Stephen Shorter: that Stephen Shorter was the attorney of Thomas Samuel Lamage at the time when the same was prepared: that to his (witness's) knowledge or belief, Elizabeth Gordon had not at any time become a surety or made herself liable to Thomas Samuel Lamage, in respect of any debt due from himself to Thomas Samuel Lamage, to any extent beyond the sum of 500*l.*: that that was the sum which he wanted to borrow of Thomas Samuel

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

Lemage, and which he agreed to lend him, if his mother-in-law, the Plaintiff, Elizabeth Gordon, would join in the security; and it was only to the amount of that intended loan of 500*l.* that he requested the Plaintiff, Elizabeth Gordon, to become surety for him to Thomas Samuel Lemage.

Upon his cross-examination on behalf of the Respondents, John Davies stated that he first knew the Plaintiff, Elizabeth Gordon, deceased, in the month of March, 1805, and continued to be acquainted with her from that time until the time of her death, in February, 1833: that he was a son-in-law, having married her daughter in 1807: that Elizabeth Gordon was a shrewd worldly woman, and understood business well: that during the whole time he had known her, he was in the constant habit of being with her; and that he had seen her collect her rents and pay her tradespeople, and manage her affairs from the time he had first known her until about five years before her death; and during the whole of that time she was well competent to conduct her own affairs: that she was quite conversant with business, and had managed her own affairs during the year 1814, to his knowledge: that he was acquainted with Thomas Samuel Lemage: that he had known him from the year 1805 until the time of his death, which he believed was in the year 1826: that a warrant of attorney (then produced) for 1600*l.* and interest, from him to Thomas Samuel Lemage, had been signed, sealed, and delivered by him for the purpose of securing to Thomas Samuel Lemage, the sum of 1600*l.* and interest thereon; he believed the same was cancelled when he had given him another warrant of attorney, for 2100*l.* which he had given

him upon his threatening to arrest him under the first warrant of attorney: that he gave him the first warrant of attorney in the month of July, 1814: that he called upon him to give the second warrant of attorney, for 2100*l.*, about three or four months afterwards; and that he gave it for fear of being arrested on the first: that he was, in the month of August, 1814, indebted to Thomas Samuel Lamage in the sum of 1600*l.*, secured by the said warrant of attorney for that sum: that he was, in the month of August, 1814, indebted to Mr. Jones in the sum of 2700*l.*: that it reached that amount about that time, and had been gradually accruing from the year 1805; from which time he had been dealing with him as a timber-merchant: that the said Mr. Jones called upon him on the 1st of July, 1814, to require payment of such debt; that he was not able to pay the same, and told him that he could not meet his demand: that he then told him to make up his books, to satisfy him that he was solvent, and he promised to do so; and rendered him an account some time afterwards: that he was not satisfied with the accounts; but after much negotiation on the matter, he did on or about the 9th of August, 1814, say that he would take 1000*l.* down, and would give him six years to pay the remainder; and he then paid him 1000*l.* down, and gave him bills for six years for the remainder: that he was, in the early part of the month of August, 1814, in want of money to pay the said Mr. Jones the sum of 1000*l.*, part of his debt of 2700*l.*, due to him as the witness had stated: that he did at that time apply to the said Elizabeth Gordon for pecuniary assistance; he applied to her to be a security for him for a sum of 500*l.*: that

1837.

GORDON

v.

SELBY.

1837.

GORDON
v.
SELBY.

she declined at first to do so, but ultimately she consented: that he could not say whether Elizabeth Gordon had actually applied to Thomas Samuel Lamage, to lend her the said sum of money for his use; but he knew that she *did* offer to give some security for the repayment of the said sum of 500*l.* which he had applied to her to procure for him from the said Thomas Samuel Lamage: that he could not say what the nature of that security was; but that the said Thomas Samuel Lamage was satisfied with it at the time; and he advanced the money to the witness, in the presence of the said Elizabeth Gordon: that he executed the warrant of attorney for 2100*l.* in or about the month of November, 1814, in consequence of the said Thomas Samuel Lamage threatening to arrest him if he did not execute the same.

No evidence was given on the part of the Respondents, of any express agreement or promise in writing on the part of the Plaintiff, Elizabeth Gordon, to pay any debt due from John Davies to Thomas Samuel Lamage, nor of any other legal consideration given by Thomas Samuel Lamage to Elizabeth Gordon for the assignments, nor of any intention on her part to grant or give the same to him, either voluntarily or in respect of any debt due from her to him; nor did the Respondents adduce any evidence to show that the assignments were ever read or explained to, or perused by Elizabeth Gordon.

Of the undue influence charged by the bill to have been exercised by Lamage over Mrs. Gordon, there was no material evidence.

On the part of the Respondents, Mrs. Elizabeth Westron stated, that during the whole time she had

been acquainted with Elizabeth Gordon, which was from and prior to the year 1814, until the time of her death, she was fully competent to manage her affairs, and she was well conversant with business; and up to the time of her marriage with the Complainant, William Gordon, which was, as she remembered, about six years ago, she had managed her own affairs; and that she had never seen a woman who was more competent to manage her affairs, or who was more capable of transacting business: that she had frequently, when in conversation with the Complainant, Elizabeth Gordon, heard her say that money to the amount of 2000*l.* had, in the year 1814, or about that time, been advanced by Thomas Samuel Lamage to John Davies: that she had upon those occasions frequently heard the Complainant, Elizabeth Gordon, say that she had given Thomas Samuel Lamage a security of property in Wild Street, Drury Lane, for repayment of the money: that she had heard the Complainant, Elizabeth Gordon, on many occasions in conversations with her, say that John Davies was always troubling her for money, which she stated he ought not to do, as she was paying Thomas Samuel Lamage 75*l.* a year interest on money which had been advanced to John Davies, and for which she had become security: that she had several times seen the Complainant, Elizabeth Gordon, pay the Defendant, Maria Lamage, the 75*l.* for the annual interest of the balance of money advanced to John Davies, which she believed was generally paid quarterly: she had also heard the Plaintiff, Elizabeth Gordon, say that the balance of money due to Samuel Lamage was 1500*l.*, and for which she was paying 75*l.* a year interest; and that when

1837.



GORDON

v

SELBY.

1837.

GORDON

v.

SELBY.

the sum of 1500*l.* principal money had been paid off by her, she was to have the property in Wild Street returned to her; and that she had heard the Complainant, Elizabeth Gordon, say that she had in her possession a bond from Thomas Samuel Lamage, covenanting that the property assigned by her should be re-assigned when the principal and interest were paid up; and that she had also seen Elizabeth Gordon and Thomas Samuel Lamage upon the most friendly terms together.

John Bridges, another of the Respondents' witnesses, upon his examination proved the execution by Thomas Samuel Lamage of an indenture of lease, then produced to him, dated the 29th day of June, 1824, made between Thomas Samuel Lamage of the first part, Elizabeth Gordon (therein described as Elizabeth Taylor) of the second part, and Thomas Cholerton of the third part. This lease recited, that by indenture of assignment, bearing date on or about the 6th day of August, 1814, and made, or expressed to be made, between Elizabeth Taylor of the one part, and Thomas Samuel Lamage of the other part, the mill, house, and premises therein-after demised or expressed, or intended so to be, were assigned to Thomas Samuel Lamage, his executors, administrators, and assigns, for the term of ninety years, and part of a year, from the of June, 1790, for securing to Thomas Samuel Lamage, his executors, administrators, and assigns, the sum of 1500*l.*, and interest, after the rate of 5 per cent. per annum; and recited that Thomas Cholerton had agreed with Elizabeth Taylor, with the approbation of Thomas Samuel Lamage, for a lease of the mill, house, and premises therein-after described and demised, for the

term of twenty-one years, from the 24th of June then instant, under and subject to the rent, covenants, and agreements therein-after contained; and that Thomas Samuel Lamage had agreed to grant and concur in the same in manner therein-after expressed: And it was thereby witnessed, that Thomas Samuel Lamage, at the request of Elizabeth Taylor, demised the premises to Thomas Cholerton as therein mentioned, subject to the yearly rent of 100*l.* thereby reserved, payable to Thomas Samuel Lamage, during such part of the term thereby demised, as the premises should remain in mortgage as aforesaid; and after payment and satisfaction of the mortgage, and all sums due thereon, then payable to Elizabeth Taylor.

Upon his cross-examination, Mr. Bridges stated that he took a very trifling part in the actual preparation of the lease: that he was, however, at that time managing clerk to Mr. Whittard, then of Gray's Inn, solicitor, who was the solicitor employed to prepare the lease, and he knew of the lease being prepared, and saw the parties upon the subject of it at Mr. Whittard's office: that he also carried instructions for drawing a draft of the lease to Mr. Preston, the conveyancer, and, to the best of his recollection, he made a copy of such draft after it had been drawn: that he knew it was originally intended that the lease should be granted to a Mr. Lindley, for his name stood in the said draft as lessee: that John Lindley was a friend or acquaintance of Thomas Samuel Lamage; that he had, to a certain extent, an opportunity of observing the conduct of Mr. Lindley during the negotiation for the lease, from seeing him at Mr. Whittard's office; but that he had no opportunity

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.
SELEY.

of seeing Mr. Lamage's or Mr. Cholerton's conduct at that time, for he did not recollect that either of them, came at all to Mr. Whittard's office pending such negotiation: that he could not go so far as to say that he inferred collusion between Mr. Lamage and Mr. Lindley respecting the lease; but Mr. Lindley appeared to him to assume an authority and control over Mrs. Taylor, which he never could account for, but which he supposed that he must in some measure have derived from Mr. Lamage: that no person was employed by Mr. Cholerton in preparing or perusing the draft lease on his behalf: that Mr. Lamage perused and approved it on his own behalf; that no person was employed as the solicitor or professional adviser of Mrs. Taylor with regard to the lease: that the draft lease had not been read over to Mrs. Taylor by himself; and, as far as he knew or had any reason to believe, it had not been perused by her, or read to her by any other person.

John Milbourne Bannister proved the execution of the lease by the Plaintiff, Elizabeth Gordon.

William James Boulton, another of the Respondents' witnesses, proved the execution, by the Defendant, Maria Lamage, of another indenture of lease, dated the 25th day of September, 1828. This lease purported to be made between the Defendant, Maria Lamage, of the first part; the Plaintiff, Elizabeth Gordon, (therein described as Elizabeth Taylor,) of the second part; and James Forsyth, of the third part; and by it Maria Lamage (with the consent and by the direction of Elizabeth Taylor) demised to James Forsyth, as therein mentioned, the messuage or tenement situate in Great

Wild Street, therein particularly described, at the yearly rent of 35*l.*, thereby reserved payable to Maria Lamage, her executors, administrators, and assigns.

1837.

GORDON

v.

SELBY.

William James Boulton, upon his cross-examination, admitted that he was, when the lease was executed by Maria Lamage, a partner with the Respondent, George Selby, in the business of a solicitor: that he had perused and approved of the draft of the lease on the behalf of Maria Lamage: that he could not state, as to his knowledge or belief, whether the lease, or the draft thereof, had been prepared in pursuance of any agreement between Mrs. Taylor and Mr. Forsyth, or any other persons: but to the best of his recollection, a previous lease had been prepared by Mr. Forsyth's solicitor, in which Mrs. Taylor had been made the only lessor; but either before or about the time of the execution of that lease, it was discovered that the demised premises were vested in the executors of Thomas Samuel Lamage, deceased; and in consequence of that discovery, George Selby and Maria Lamage were applied to, as executors, to grant, or join in granting, a lease of the premises to Mr. Forsyth: that he could not state, as to his knowledge or belief, whether any person had been employed as the solicitor or professional adviser of Mrs. Taylor, as to the lease which preceded the one in which Maria Lamage had been made a party; nor could he state, as to his recollection or belief, whether he had perused the last-mentioned lease on the behalf of Maria Lamage and Mrs. Taylor, or on the behalf of Maria Lamage only, the draft having been returned to Mr. Duncan, who had prepared it, and not having been seen by

1837.

GORDON

v.

SELEY.

him since ; and that if he had not perused it on the behalf of Mrs. Taylor, he believed that no other person had done so.

John Duncan, another of the Respondents' witnesses, deposed, that he was, in the month of November, in the year 1828, instructed to draw or prepare the last-mentioned lease, and did accordingly draw or prepare the same : that he knew Edward Whitaker, whose name appeared to be set or subscribed to the same as a witness attesting the execution thereof : Edward Whitaker was, at the time the lease bears date and purports to have been executed, his clerk ; and (after proving his handwriting) he stated, that Edward Whitaker was not then in his service ; that he left the same about the year 1829 : that he did not know whether Edward Whitaker was then living or dead ; and if living, where he then was, or could be heard of.

Upon his cross-examination, this witness stated, that in the month of November, 1828, he was employed by Mr. Forsyth, as his solicitor, to prepare a lease to him, from Elizabeth Taylor, of a house and premises in Wild Street, Lincoln's Inn Fields, pursuant to an agreement which was brought to him by Mr. Forsyth, and which purported to be an agreement between Mrs. Taylor and Mr. Forsyth only : that he was not aware of any person having been employed to act as the attorney or solicitor of Mrs. Taylor, in respect of the lease : that one Maria Lamage was made a granting party to a lease of the premises which was substituted for the lease alluded to in the first part of his answer, in consequence of its having been discovered that Mrs. Taylor had not the power to grant a lease of the premises ; and that Maria Lamage had some

legal estate or interest in those premises: that he did not recollect he ever knew in what character or manner she, Maria Lamage, became entitled to such estate or interest: that George Selby, one of the Defendants, and his then partner, William James Boulton, acted as the solicitors of Maria Lamage in respect of the last-mentioned lease; and that he never saw Mrs. Taylor upon the subject of either of the said leases; and could not state, as to his knowledge or belief, whether, previous to the discovery of Maria Lamage's interest, she was, or seemed to be aware, or to consider, that any other person besides herself had any right or property in the premises, except as far as might be inferred, from the aforesaid circumstance, that in the agreement she was the only granting party.

Taylor Mason, another of the Respondents' witnesses, a relative of Mrs. Gordon, but very young at the date of the transactions, gave evidence as to conversations respecting the loan and security, and payment of the interest (75*l.*) by Mrs. Gordon to M. Lamage. An objection was suggested to his evidence, on the ground of interest as a legatee under the will of Maria Lamage; but on cross-examination he said that he had released his legacy.

Joseph Earle proved the capacity of Mrs. Gordon in business; he proved also the draft of the bond of indemnity given by Lamage to Mrs. Gordon, which draft he said that he had heard, in a conversation between Mrs. Gordon and Lamage, was drawn for the purpose of a bond being given by Lamage to Mrs. Gordon, that she might have the property in Wild Street, assigned by her as a security for money advanced to John Davies,

1837.

GORDON

v.

SELBY.

1837.

GORDON

v.

SELBY.

re-assigned to her, when the money had been paid back.

The draft was full of erasures, but purported to be a draft of a bond from T. S. Lamage to Eliz. Taylor in a penal sum of 2000*l.*, reciting that J. Davies was indebted to T. S. Lamage in a sum of 2000*l.*, and that E. Gordon had assigned the premises in question to secure the repayment of that sum, with interest in the mean time ; and the condition was, not to sell or dispose of the premises during the life of Mrs. Gordon, while the interest of the debt was regularly paid.

The draft itself was produced in evidence, as also was the case laid by Mr. Lamage before Mr. Cooke, and his opinion. In the case, the transaction was stated to the same effect, in substance, as in the draft bond ; except that, after stating that Davies was indebted in 2000*l.*, the case states that the security was to be given for the said 2000*l.* and interest. The case also states the bond, to the effect before set forth.

The cause having been heard on the 11th of January, 1836, his Honour the then Master of the Rolls delivered his judgment ; and after having stated and commented upon the pleadings and the evidence which had been adduced on either side, declared his opinion to be, that the security of the said assignments was good for the sum of 1500*l.* and interest ; that the objections raised by the bill to the security, and the charges which had been made of alleged fraud, had failed of proof ; and that therefore the bill, except so far as it sought to redeem the property comprised in the assignments on payment of the 1500*l.* and interest, ought to be dismissed with costs.

His Honour therefore decreed and declared,

that the indentures of assignment bearing date respectively the 4th and 6th days of August, 1814, were a good security for the sum of 1500*l.* and interest thereon. And his Honour ordered, that the Appellants' bill, except so far as the same sought a redemption of the leasehold premises comprised in the same indentures, upon payment of what should be found due from the Appellants in respect of any debt due from Mr. John Davies to the said Mr. Thomas Samuel Lamage, deceased, be dismissed with costs, to be taxed by the Master of the Court, to whom these causes stood referred: And it was ordered, that the said Master should include in such taxation the costs of Mrs. Maria Lamage, deceased: And it was ordered, that the costs of the Defendant, Mrs. Maria Lamage, should be paid to the Respondents, Thomas Hart and Samuel Lamage, her personal representatives: And his Honour ordered and decreed, that it should be referred to the Master to take an account of what was due to the Defendant, Mr. George Selby, as the surviving executor of Mr. Thomas Samuel Lamage, for principal and interest, in respect of the sum of 1500*l.*, and to tax the Respondents so much of the costs of this suit as related to the redemptions aforesaid, including therein the costs of the said late Defendant, Mrs. Maria Lamage; and upon the Appellants, or either of them, paying to the said Mr. George Selby what the said Master should so find to be due to him for such principal and interest, together with the Respondents' costs of so much of this suit as related to the redemption aforesaid, and also paying unto the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, their

1837.

GORDON

v.

SELBY. .

1837.

GORDON

v.

SELBY.

and the said late Defendant, Mrs. Maria Lamage' last-mentioned costs, within six months after the said Master should have made his report, at such time and place as the Master should appoint; it was ordered, that the said George Selby should re-assign the leasehold premises comprised in the said indentures respectively, free and clear of all incumbrances done by him or by the said Mr. Thomas Samuel Lamage, or any claiming by, from, or under them respectively, and should deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said Appellants, or to such of them as should so redeem the same, or as they should appoint; but in default of the Appellants, or any or either of them, paying unto the Respondents what the said Master should so find due for such principal, interest, and costs as aforesaid, by the time aforesaid, it was ordered, that the remainder of the Appellants' bill should also stand dismissed out of the said Court, with costs, to be taxed by the said Master: And it was ordered, that the Appellants should also pay to the Respondents, Mr. Thomas Hart and Mr. Samuel Lamage, the remainder of the said costs of the said late Defendant, Mrs. Maria Lamage; and, for the better taking the said accounts, the parties were to produce before the said Master, upon oath, all books, papers, and writings in their power, relating thereto, and were to be examined upon interrogatories, as the said Master should direct, who, in taking the said accounts, was to make unto the parties all just allowances; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

The appeal was against this decree.

For the Appellants, Mr. *Pemberton* and Mr. *Knight*.

It was not proved, or even alleged, that Elizabeth Taylor had ever incurred any debt to Thomas Samuel Lamage on her own account, or had ever signed or made any writing by which she was bound for any debt or sum of money due to Thomas Samuel Lamage from John Davies.

The contents of the indentures of assignment of the 4th and 6th of August, 1814, and the stamps affixed to them, are wholly inconsistent with the allegation that they were assignments by way of security to Thomas Samuel Lamage for any debt due to him from John Davies; and no evidence is admissible to contradict the consideration stated on the face of the instruments themselves. The nature of those instruments, and the stamps upon them, establish the case of a resulting trust which is insisted upon for the Appellants; and the execution of those assignments by Elizabeth Taylor, without any professional advice, and under the influence which Thomas Samuel Lamage is proved to have had over her, are circumstances of great weight against the claim of the Respondents to hold the property as a security, not for any debt due by Mrs. Taylor, but for Davies' debt to Lamage.

The depositions as to acknowledgments or declarations by Mrs. Taylor, that the assignments were by way of security for the debt due to Thomas Samuel Lamage by John Davies, ought not to have been admitted, and are not sufficient evidence that Mrs. Taylor ever made herself legally liable to Lamage for that debt, or of the amount of the debt for which she is alleged to have made herself liable.

1837.

GORDON
&
SELBY.

1837.

GORDON

v.
SELBY.

The decree declares the leasehold property to be a security for the debt due from Davies to Lemage to an amount greater than that for which Lemage himself, in the draft case stated by him for the opinion of counsel, alleged to be the amount for which Mrs. Taylor made herself liable, and greater also than the amount mentioned in the evidence of Davies as that for which it was proposed or intended that Mrs. Taylor should make herself liable.

The draft or writing, purporting to be the draft of a bond, is not evidence against the Appellants, and ought not to have been admitted as evidence to prove the amount of the debt due by Davies to Lemage, for which Mrs. Taylor is alleged to have made herself liable, or as an acknowledgment that she had made herself security for any such debt.

At all events an issue should have been directed, whether the deeds were executed by Mrs. Taylor to secure any and what sum of money to Lemage. This the Appellant is ready to accept, with a direction for liberty to the Judge to indorse any special matter on the *postea*.

For the Respondents, Mr. *Jacob* and Mr. *Wigram*.

It is admitted upon the pleadings that some security was intended to be given, and the question is, whether it was obtained by fraud. The 1500*l.* mentioned in the lease of 1824, is consistent with the rest of the case, for the original debt had been reduced, and the recitals of this lease constitute a sufficient acknowledgment for the support of the Respondents' claim. No case is brought forward by the Plaintiff to impeach the lease. The answers insist upon this and the lease of 1828. The

schedule to Selby's answer contains the leases, the draft bond, and the case for Cooke's opinion. On the 30th of November, 1833, there was an order of Court for the production of these specific documents. In June, 1834, there was an order to amend the bill, upon affidavit of inspection of these documents. The bill was amended accordingly; and yet is silent upon the subject of the documents, and makes no case against the leases; they were made to the tenants of Mrs. Taylor, and the witnesses are not cross-examined. No evidence is given on the part of the Plaintiff respecting the cancelled instruments endorsed upon the leases, which seems to form a prominent part of the Appellants' case; and during all the time Mrs. Taylor was paying 75% annually, by way of interest. There is no proof of fraud, and yet an issue is asked; but this is matter of indulgence, and in the discretion of the Court. Of the case of alleged influence arising from the cohabitation of the daughter with Lamage, there is neither proof nor probability; the conveyance is stated by the bill, that it was to be a security for some loan, of some amount, is in proof, and the alleged influence is equally applicable to both cases. If it ever existed, it would have ceased upon the death of Lamage, which occurred in 1826; yet the payment of interest equivalent, at the rate of 5 per cent., to the principal secured, continues; and the party supposed to have been influenced and defrauded was, according to the evidence, a woman of great acuteness and experience in business. Under these circumstances there ought to be no inquiry; the facts in proof being sufficient to enable a Court of Equity to decide for itself, without the aid of a Court of law.

1837.

GORIION

v.

SELBY.

1837.

GORDON

v.

SELBY.

There was acquiescence during eighteen years ; no disability in the party ; and her acts were in accordance with and explanatory of the case, as made by the Respondent.

Admissions made by a Defendant are not allowed to be given in evidence unless alleged by bill. *Hall v. Maltby**; *Small v. Attwood*†; *Powys v. Mansfield*.‡

As to a resulting trust, there is none, if a consideration is shown.

15th July.

The *Lord Chancellor*.—The case made on behalf of the Appellants is, that certain property belonging to Mrs. Gordon, whose interests they represent, was assigned by her to one Lamage, who is represented by the Respondents ; that this assignment was obtained by an improper influence exercised by Lamage over Mrs. Gordon, and without consideration. That having so obtained the assignment, Lamage claimed a right to hold the property as a collateral security for a debt owing to him by one Davies, the son-in-law of Mrs. Gordon. Mrs. Gordon, nevertheless, was left in possession of the property, receiving the rents, and from that time paying to Lamage the sum of 75*l.* annually, until the year 1826, when Lamage died. It appears that Davies having become bankrupt, Lamage proved his debt, amounting to 2100*l.*, under the commission, and received a dividend, by which the debt was reduced to 1500*l.*, and upon this sum the interest was paid by Mrs. Gordon up to the time of Lamage's death, and afterwards to his representatives, nearly until the time of filing the bill. In support of the case

* 6 Price.

† 2 Y. & J. 512.

‡ 6 Sim. 565.

on the part of the Appellants, the evidence of John Davies, and other witnesses, was read, and certain documents were produced, among which was a case laid before Mr. Cooke, as to the expediency of proving the debt under the commission; whether such proof would affect the right to hold the security in question, which was stated in the case. The draft of a bond given by Lemage to Mrs. Gordon was also produced, in which the assignment of the leasehold property was recited, and the agreement that it should be a security for the debt; and by which it was conditioned that the property should not be sold during the life of Mrs. Gordon, provided the interest upon the debt was regularly paid, and that the property itself should be re-assigned when the principal was paid. The depositions of Davies, and the other witnesses, with the documents produced in evidence, displaces entirely the whole of the principal case made by the bill; and it is evident that the assignment of the leasehold property was intended as a security for the debt of Davies, and was not confined to the 500*l.*, as the Appellants seek to establish by his deposition. There are some parts of the evidence which may be passed over; but the question arising upon the proofs is, whether the security is to be confined to the sum of 500*l.* or comprises the whole debt claimed.

In support of the claim, on the part of the Respondents, several witnesses depose to admissions by Mrs. Gordon, that the assignment was for the security of a debt from Davies; that it amounted to 1500*l.*, appears from the conclusive fact, that she paid upon that debt 75*l.* a year, by way of interest. It is argued, that as the original assignment appears

1837.

GORDON

v.

SELEY.

1837.



GORDON

v.

SELBY.

to be without consideration, there is a presumption of a resulting trust, which cannot be repelled by parol testimony. This is a misapprehension of the law of the case. It is alleged also, that Mrs. Gordon executed the deed without advice, under improper influence and in ignorance of the contents; but to support these allegations there is an absence of all evidence, and such things are not to be presumed, especially under circumstances of long acquiescence and lapse of time; nor ought an issue, in such a case, to be directed to try whether the assignment was made for the purposes alleged. It would be dangerous and unjust to commit such a case to a trial at law, all the witnesses being dead.

Lord *Brougham* agreed in this opinion, thinking the evidence quite sufficient of itself to enable a Court of Equity to decide.

Judgment affirmed, without costs.

1837.


CARTER
v.
PALMER.

IRELAND.

(COURT OF CHANCERY.)

WILLIAM PARROTT CARTER, Esq. *Appellant;*SIR WILLIAM HENRY PALMER, Bart. *Respondent.*

By a bond, dated in 1816, P. (who was entitled under a devise to the remainder for life of lands in Ireland, subject to a life estate in E.,) became bound in a penal sum of 8000*l.* reciting that he lately carried on business with O. and Co., as merchants, in copartnership, and that they were indebted to S., and M. his partner, in the principal sum of 2663*l.*, and that S. was solely entitled to the debt; for which P. had agreed to give his separate bond, payable two years after the death of E., or so much thereof as should not be paid in the meantime by O. and Co., and also to give judgments in the Courts of King's Bench in England and Ireland, and to execute an indenture for the purpose of charging the principal sum and interest upon his reversionary estate in the lands, in Ireland. The condition of the bond was, to pay the principal sum with interest, &c., within two years next after the death of E., and such further sums as S. should pay for keeping on foot the then present and all future insurances on the life of P., not exceeding altogether the sum of 4000*l.*

By indenture of even date with the bond, P. covenanted with S., that immediately after the death of E. he would charge the lands by way of mortgage with the principal sum of 2663*l.* and interest; and such further sums as S. might expend upon insuring the life of P., with interest.

In 1817, S. was declared a bankrupt. By indenture, dated the 10th of March, 1820, the assignees of S. assigned to M. (formerly the partner of S.) the bond of the Respondent, and warrants of attorney, and judgments for securing the same and the monies and interest thereby secured, and then due or to become due, and all other the goods, &c. of which the bankrupt and M. were jointly possessed, &c., as copartners

1837.



CARTER
v.
PALMER.

and which were then vested in the assignees, and all indentures, bonds, &c. concerning the same, to hold, &c. In Hilary term 1820, judgment was entered up on the warrant of attorney in the Court of King's Bench in Dublin, against P., at the suit of S. In July, 1832, E. died, and thereupon P. entered on the lands in Ireland, and became seised thereof for the term of his life. On the 3d of August, 1833, M., in consideration of 2000*l.* paid to him, and 400*l.* to be paid to him by C. (the Appellant) in May following, in case P. should be then living, assigned to C. the bond and deed of covenant of 1816, and all monies due thereon, &c. In July, 1834, two years after the death of E., the Appellant filed a bill in the Court of Chancery in Ireland, stating that there was then due, for principal and interest, upon the securities before mentioned, upwards of 6000*l.*, and praying a declaration that he was entitled to the benefit of the covenant contained in the indenture of 1816, and for a specific performance thereof by P.; also for an account of principal and interest due, and to settle the necessary mortgage deed, with a receiver, injunction, &c.

P. by his answer stated, that he had been imposed upon, and induced by misrepresentation to execute the bond; and that, supposing he was liable, for the sum due upon the securities was less than represented by the bill, that the securities should stand only for such sum as was really due. He also represented, that in 1832 he had entered into a treaty with M. to compromise the debt for a sum of 2000*l.*, at which time C. was employed as the counsel, and acted for and advised P. upon the matter of that treaty, whereby he gained a knowledge of all the circumstances relating to the debt; and being the professional adviser of P., and having obtained this knowledge as such, privately made an agreement with and purchased the debt of M., for a sum of 2400*l.*; and P. then, by his answer, stated an offer made by him in writing, in December, 1834, to pay to C. the sum of 2400*l.* for his purchase, with interest and costs, which offer he then and thereby repeated. Evidence was given of the allegations of the bill and answer respectively.

By the decree it was declared, that C. was entitled to 2400*l.*, with interest and his costs up to the time of service of the notice, according to the terms of the offer made by P., provided C. should declare his election to accept such offer within two months from the date of the decree, &c., with an account of the sum, due, &c., and that he should only hold the judgment and deed of covenant as securities for such sum

as should be found due ; and in case C. should decline or omit to make such election, that his bill should be dismissed with costs.

Upon appeal to the House of Lords, this decree was reversed, upon the ground that no such relief could be given upon the pleadings, according to the rules of equity ; but that a cross bill, on the part of P., should have been filed. It was directed by the order, that a reference should be made to the Master, to ascertain what was due upon the security, &c.

1837.

CARTER

v.

PALMER.

ROGER PALMER, Esquire, being, at the time of the making his will and of his decease, seised or well entitled to considerable freehold estates, situate in England and in Ireland, by his last will and testament in writing, dated the 20th of April, 1801, and duly made and published as by law required to pass real estates by devise, gave and devised unto trustees, therein named, and their heirs, all his real estates whatsoever and wheresoever, in the United Kingdom of Great Britain and Ireland, to the use of his sister Elizabeth, the wife of Joseph Budworth, Esquire, and her assigns, for the term of her natural life, with remainder, in the lifetime of his sister, to trustees, to preserve contingent remainders. And after her decease, as to all his real estates in Ireland, the testator gave and devised the same to the use of the Respondent, then William Henry Palmer, Esquire, and his assigns, for his natural life, with remainder, during the lifetime of the Respondent, to trustees, to preserve contingent remainders ; and after the decease of the Respondent, to the use of the first and every other son of the body of the Respondent, in tail male, with divers remainders over.

1837.

CARTER
v.
PALMER.

The testator died in or shortly after the end of the year 1811, and thereupon Elizabeth Budworth, who assumed the surname of Palmer, became seised for her life of all the estates in England and Ireland, with remainder, as to the Irish estates, to the Respondent for his life.

The Respondent, by bond, dated the 31st of July, 1816, became bound in the penal sum of 8000*l.* to Richard Wilsonn Sheppard, with a condition thereunder written, reciting that the Respondent lately carried on business with Alexander Oswald and George Howell, as merchants, in co-partnership together, in Dean Street, Soho, London; and on Ormond Quay, Dublin, under the firm of Alexander Oswald and Company, who, in the course of such their business, became, and then were justly and truly indebted unto the said Richard Wilsonn Sheppard, and to Edward Longdon Mackmurdo, theretofore his partner, in various sums of money, amounting in the whole to the principal sum of 2,663*l.* 19*s.* 6*d.*, besides interest as thereafter mentioned, viz: on the sum of 200*l.*, part thereof from the 19th of October, 1811; on the further sum of 375*l.* 9*s.*, other part thereof, from the 3d of November, 1811; on the further sum of 624*l.* 9*s.* 10*d.*, other part thereof, from the 13th of December, 1811; on the further sum of 737*l.* 12*s.* 11*d.*, other part thereof, from the 24th of January, 1812; and on the further sum of 613*l.* 1*s.* 11*d.*, other part thereof, from the 30th of January, 1812; which said several sums were due upon bills of exchange which were all unpaid; on the further sum of 37*l.* 0*s.* 10*d.*, other part thereof, from the 28th of September, 1812; on the further

sum of 25*l.* 8*s.* 4*d.*, other part thereof, from the 12th of October, 1813; on the further sum of 25*l.* 8*s.* 4*d.*, other part thereof, from the 19th of September, 1814; and on the further sum of 25*l.* 8*s.* 4*d.*, residue thereof, from the 19th of September, 1815; which said four last-mentioned sums were monies paid by the said Richard Wilsonn Sheppard and Edward Longdon Mackmurdo, or one of them, as premiums of an insurance on the life of the Respondent for the sum of 1,000*l.*, and which he had agreed to repay with interest; and reciting that Richard Wilsonn Sheppard was solely entitled to the debt and interest, as a collateral security, for which, as well as for such further sums of money as Richard Wilsonn Sheppard might pay for insuring the life of the Respondent, and interest thereon, he, the Respondent, had agreed to give his separate bond, to be payable at the expiration of two years next after the decease of Elizabeth Budworth Palmer, or so much thereof as should not be paid in the mean time by Alexander Oswald and George Howell, or either of them; and also to give judgments in the Courts of King's Bench in England and Ireland, and to execute an indenture, or deed of covenant of three parts, bearing even date with the bond, and made between the Respondent of the first part, the said Edward Longdon Mackmurdo of the second part, and the said Richard Wilsonn Sheppard of the third part, for the purpose of charging the said principal sums of money and interest, and such further sums of money and interest as aforesaid, upon the Respondent's then reversionary interest in the testator's Irish estates, and subject to the life in-

1837.

CARTER

v.

PALMER.

1837.

CARTER
v.
PALMER.

terest therein of Elizabeth Budworth Palmer. The condition of the obligation was declared to be, that if the Respondent, his heirs, executors, or administrators, within two years next after the decease of Elizabeth Budworth Palmer, should pay unto Richard Wilsonn Sheppard, his executors, administrators, or assigns, as well the said 2,663*l.* 19*s.* 6*d.*, with interest from the respective times thereinbefore mentioned, as all such further sums of money as Richard Wilsonn Sheppard, his executors, administrators, or assigns, should pay for effecting, continuing, and keeping on foot the then present and all future insurances on the life of the Respondent, for better securing the principal monies and interest aforesaid, and which principal monies were not to exceed in the whole the sum of 4,000*l.*, then the said obligation was to be void, or else to be and remain in full force and virtue.

By indenture of even date with the above-stated bond, and made between the Respondent of the first part, Edward Longdon Mackmurdo of the second part, and Richard Wilsonn Sheppard of the third part, the Respondent covenanted with Richard Wilsonn Sheppard, that he, the Respondent, would, immediately on the decease of Elizabeth Budworth Palmer, make and execute all such further and reasonable acts, deeds, and assurances, for the better and more perfectly charging the said estates, late of the testator, by way of mortgage, with payment of the said principal sum of 2,663*l.* 9*s.* 6*d.*, and interest, and such further sums of money as the said Richard Wilsonn Sheppard, his executors, administrators, and assigns, might

expend in insuring the Respondent's life, as aforesaid, with interest, as by Richard Wilsonn Sheppard, his executors, administrators, or assigns, or his or their counsel, should be advised and required. The indenture then provides for payment of three several annual premiums of the then existing policy of insurance on the Respondent's life, and for the assignment by him to Richard Wilsonn Sheppard of a certain policy of insurance on the Respondent's life for 4,000*l.*, upon the happening of the event therein mentioned, or for effecting a new insurance in a sufficient sum to secure the debts to Richard Wilsonn Sheppard, his executors, administrators, and assigns, and provides for the repayment by the Respondent of all the premiums to be paid in respect thereof, with interest. By the same indenture the Respondent covenanted and agreed that the said indenture, and the said bond and judgments, were executed, accepted, and given, upon condition that the Respondent should forthwith pay unto Richard Wilsonn Sheppard, his executors or administrators, or his or their solicitor, his solicitor's bill, as between attorney and client, as well for preparing the said indenture and the bond and judgments, as for his journey to Dublin in that matter, and the proceedings had thereupon, and for all other matters and things in negotiating that agreement, or in relation thereto, as therein particularly mentioned; and in the meantime, that such costs, charges, and expenses, then incurred, and to be incurred, should remain as part of the monies secured by the said indenture, bond, and judgments: And it was thereby provided, that in case it should thereafter appear that any

1837.

CARTER

v.

PALMER.

1837.


CARTER
v.
PALMER.

mistake had been made in the amount of the said debt, and that the balance due should be found to be less than was stated in the accounts rendered, the said deed, and bond, and judgments were to be securities for so much less as the real balance should be found to be, together with interest thereon, and such other sum and sums of money for insurance, and interest, and costs, as aforesaid.

A commission of bankrupt, dated the 12th of February, 1817, was issued against Richard Wilson Sheppard, under which he was found and declared a bankrupt, and Joseph Echalez, Henry Hughes, and Antonio De La Torré, were chosen his assignees, and the usual assignment was thereupon made to them.

By indenture, dated the 10th of March, 1820, made between the assignees of the one part, and Edward Longdon Mackmurdo, of the other part, the assignees (in pursuance of the resolution of creditors of the bankrupt therein recited) bargained, sold, and assigned unto Edward Longdon Mackmurdo the bond of the Respondent, of the 31st of July, 1816, and also the warrants of attorney and judgments for securing the same bond, and the monies and interest thereby secured, and then due or to become due, and all and singular other the goods, wares, merchandises, securities for monies, debts, and effects whatsoever, which the bankrupt and Edward Longdon Mackmurdo were jointly possessed of, interested in, or entitled unto, as co-partners, and which were then vested in the assignees, as assignees, and all indentures, bonds, deeds, papers, and writings relative to or concerning the same, to hold, receive, and enjoy the indenture of covenant, bond, warrants of attorney,

judgments, and premises thereby assigned unto Edward Longdon Mackmurdo, his executors, administrators, and assigns, as and for his and their own proper deeds, monies, and effects absolutely.

In or as of Hilary Term, 1820, judgment was entered up, under the Irish warrant of attorney, in his Majesty's Court of King's Bench in Dublin, against the Respondent, at the suit of Richard Wilsonn Sheppard, for the sum of 8000*l.* sterling, with 4*l.* 13*s.* 11*d.* costs.

Upon the death of Mrs. Elizabeth Budworth Palmer, on the 31st of May, 1832, the Respondent entered upon the estates in Ireland, and became seized thereof for the term of his natural life.

By indenture, dated the 3d of August, 1833, and made between Edward Longdon Mackmurdo, of the one part, and the Appellant of the other part, Edward Longdon Mackmurdo, in consideration of 2000*l.* to him paid by the Appellant, on the sealing and delivery thereof, and of the further sum of 400*l.* to be paid him by the Appellant on the 31st of May then next, in case the Respondent should be then living, and for which 400*l.* the Appellant had given his bond, bargained, sold, assigned, and transferred unto the Appellant the bond and indenture or deed of covenant dated the 31st of July, 1816, and all monies due thereupon, or to be received by virtue thereof; and the judgment in the Court of King's Bench in Ireland, of Hilary Term, 1820, to hold, receive, and enjoy the same unto the Appellant, his executors, administrators, and assigns, for his and their own absolute use and benefit.

On the 31st of May, 1834, being two years after

1837.

CARTER

v.

PALMER.

1837.

CARTER
v.
PALMER.

the decease of Mrs. Elizabeth Budworth Palmer, the bond and securities became due and payable.

On the 5th of July, 1834, the Appellant filed his bill in the Court of Chancery in Ireland, against the Respondent, setting forth that there was then due, for principal and interest and other monies, on the securities aforesaid, upwards of 6000*l.*, and praying a declaration that the Appellant was entitled to the benefit of the covenant contained in the indenture of the 31st of July, 1816, and for a specific performance thereof by the Respondent, and for a reference to the Master to take an account of principal and interest due on the said securities, and to settle the necessary mortgage deed, and for a receiver of the rents and profits of the estates in Ireland, and for an injunction to stay the Respondent's receipt thereof.

The Respondent having appeared, by his answer admitted the execution of the bond of 31st July, 1816, and the deed of covenant of the same date, under the circumstances thereafter mentioned, that viz., at the time of the execution of the bond he was residing at Bruges, in the Netherlands, and was waited upon by an individual on behalf of Richard Wilsonn Sheppard, who produced the bond and deed, requiring them to be executed immediately, and representing that by the acts done by him, the Respondent, he had become a partner in the firm of Oswald and Howell, and answerable for their debts, and that unless he executed the bond, he would be exposed to much costs, and his estate in remainder would be sold; and the Respondent, after denying that he ever was in partnership with the firm of Oswald and Company, said that being little

acquainted with business, and influenced by such representations, he executed the bond ; that since execution thereof, he had heard that the firm of Oswald and Company was not indebted to Shepard and Mackmurdo, and that consequently the bond and securities ought not to be enforced, or at least that they should stand only for such sum as was really due ; and submitted that the Appellant should not claim any benefit from his assignment of the said securities.

The Respondent by his answer then said, that for several years before, and until the latter end of 1831, the Appellant was employed by the Respondent as his consulting counsel and confidential professional adviser, and that Edward Longdon Mackmurdo, having applied for payment of the bond, the Respondent caused a statement of the circumstances to be laid before the Appellant, who then became acquainted with the existence of his claims ; that a treaty for compromise of the demand was set on foot with Mackmurdo, and the terms thereof were submitted to the Appellant as his confidential adviser, and which were nearly concluded in the beginning of the year 1832 ; that Mrs. Budworth Palmer died on the 31st of May, in that year ; and the Appellant, having been in treaty with Mackmurdo before her death, entered into some treaty with him for the assignment of the bond, which Mackmurdo afterwards refused to recognise ; that he, Mackmurdo, again entered upon a treaty with the Respondent, through his English solicitors, for a compromise ; and they were on the point of terminating all differences for a sum of 2000*l.*, or thereabouts, when the Appellant applied to Mack-

1837.


CARTER
&
PALMER

1837.



CARTER

v.

PALMER.

murdo, and agreed to give for the bond and judgment, and all money due at foot thereof, 2400*l.*; that at the time of such negotiation, the Appellant was the counsel and professional adviser of the Respondent, and had been such for about eleven years before; and the Respondent was not aware until some time afterwards of the contract entered into between Mackmurdo and the Appellant, which was made without his knowledge or sanction, contrary to his interest; and the Respondent submitted that the Appellant acted unjustly in interfering with Mackmurdo for the purchase of the bond, and procuring the assignment thereof, and in doing so, that the Appellant violated the trust and confidence reposed in him. The answer then stated an offer made on behalf of the Respondent, by notice in writing, dated the 24th of December, 1834, to pay the Appellant the sum of 2400*l.*, the purchase money given by him for the bond, with interest and costs; and the Respondent then, as he said for peace sake, and to avoid litigation, repeated the same offer.

The Respondent having by his answer raised a question, whether he had executed the bond and securities under threats and fraudulent misrepresentations, as above set forth, the Appellant amended his bill, charging that the bond and deed were prepared by or under the direction of Mr. Matthew O'Reilly, barrister at law, then acting for the Respondent, and who was then his land-agent, (and which Mr. O'Reilly was the attesting witness to the execution of the said securities by the Respondent); and that the same securities remained in Mr. O'Reilly's hands, from such execution thereof, on the 16th of July, 1816, till the 20th of May, 1817, when they were transmitted by him to Mr.

Henry Carpenter, the then solicitor of Sheppard and Mackmurdo.

The Respondent, by his answer to the amended bill, denied the agency of O'Reilly, save as a friend in receiving his income from the castle of Dublin, and in receiving rents out of certain lands, payable to the Respondent as an *elegit* creditor, on foot of an *elegit* therein particularly mentioned; and denied that the indenture or bond were prepared or approved of by O'Reilly, or that he acted on his behalf in the transaction, but admitted that the bond and deed might have remained in O'Reilly's hands until the 20th of May, 1817, and might then by him have been transmitted to Carpenter, as in the amended bill stated.

Before the Respondent had answered the Appellant's bill, the Appellant had applied for, and obtained a conditional order for a receiver of the Irish estates, which the Respondent discharged by investing in government $3\frac{1}{2}$ per cent. stock, under an order of the Court, the sum of 6147*l.* 19*s.* 3*d.* cash, and transferring the stock, so invested, to the credit of the cause, to abide the further decree or order of the Court in the cause.

The Appellant having filed replication to the Respondent's two answers, and the Respondent having rejoined, the cause was at issue, and both parties entered into evidence, and examined witnesses, in chief and the Appellant cross-examined several of the Respondent's witnesses.

The following is an abstract of the evidence:—

Mr. Samuel Cotton, of Basinghall Street, solicitor, proved that he was from the year 1824, for six years, or thereabouts, the solicitor of E. L. Mackmurdo, and during that period was employed

1837

CARTER

v.

PALMER.

1837.

CARTER
v.
PALMER.

by him to obtain from the Respondent payment of, or further security for, the sums mentioned, to be secured by the bond and deed of covenant. And in the course of such employment, he understood it to be admitted by the Respondent, whom he, witness, saw at Bruges, expressly upon the business of obtaining such payment or security, and also by Messrs. Lucas and Parkinson, as his solicitors, that the said sums were wholly and *bonâ fide* due and owing by the Respondent.

Sir Peter Laurie, knight, proved having obtained, on the 26th of December, 1814, from the Respondent and George Howell, as partners in the firm of Alexander Oswald and Company, a joint bond, to secure a debt which was due to witness as a creditor of the firm, and that he gave bills also for the debt as a collateral security; and he proved payment to him by the Respondent of 600*l.*, in discharge of such debt.

Richard Wilsonn Sheppard Wilsonne, theretofore Richard Wilsonn Sheppard, the bankrupt (who disclaimed all interest in the bond and securities, and the monies thereby secured), proved the connection of the Respondent as a partner in the firm of Alexander Oswald and Company, and meeting him in that character; and he proved the matters out of which the debt arose, for securing which the securities were given, and his employing his solicitor, Mr. Carpenter, in 1815, to go to Ireland, to effect a settlement with the Respondent, as a partner in the firm of Alexander Oswald and Company, who had previously stopped payment; and that Matthew O'Reilly acted, in relation to the said demand, as the legal adviser and agent of the Re-

spondent. And he then proved the taking and adjusting of the accounts, and the striking the balance, which witness proved he understood and believed to be fairly and duly settled by the partners of both firms, or by their respective legal advisers and agents. And he denied authorising any one to make the representations as an inducement to the execution of the bond, as pretended and set forth by the Respondent in his original answer.


Mr. Henry Carpenter, the solicitor employed by Richard Wilsonn Sheppard, proved meeting O'Reilly on the business as the legal adviser of the Respondent, and corresponding with him in that character; and his evidence confirmed the evidence of Mr. Sheppard Wilsonne, as to the taking and adjusting the accounts, and striking the balance; and that the drafts of the said securities were submitted to Mr. O'Reilly for his approval, on behalf of the Respondent. And that he, O'Reilly, undertook to get them executed by the Respondent, which he accordingly did; and that such securities, so executed, remained with O'Reilly until May following, when he transmitted them to witness.

Mr. William Day, another witness on behalf of the Appellant, in a long examination, confirmed the evidence of the above witnesses in all material respects.

The Respondent, on his part, examined several witnesses, some of whom the Appellant examined also on cross interrogatories.

George Howell, one of the partners in the late firm of Alexander Oswald and Company, whose evidence in chief was directed principally to calling in question the correctness of the balance struck on

1837.


CARTER
v.
PALMER.

1837.

CARTER
v.
PALMER.

adjusting the accounts, and that the securities given by the Respondent were to stand only for the amount to be found really due, on a new investigation of accounts; on cross-examination, proved that the Respondent was a partner in the firm of Alexander Oswald and Company, though there was no deed of partnership.

E. L. Mackmurdo, proved that the Appellant, about the middle of the year 1832, for the first time proposed to become the purchaser of his claims and demands in the pleadings mentioned, when, after some discussion, the witness agreed to take 1000*l.*, and subscribed a memorandum to that effect, which contract the witness afterwards refused to conclude; and that about the middle of the year 1833 the witness accidentally met the Appellant, and a new treaty was opened, and a new contract made and signed, to sell the debt to the Appellant for the sum of 2400*l.* And the witness said that there was not, to his knowledge and belief, any treaty for the compromise of the said claims and demands entered into or carried on by and between himself and the Respondent, or any person on his behalf, further than that he had heard and believed that Messrs. Lucas and Parkinson, the Respondent's solicitors, at different times, in the course of conversation with witness's solicitor, expressed some intention of making an offer for compromise, but they never actually made an offer; and that for such reason, the Appellant was not aware of the pendency of any treaty or negotiation with the Respondent for a compromise; and the Appellant did not at any time interfere with witness, to prevent a compromise with the Respondent. He confirmed the

evidence of Mr. Sheppard Wilsonne, and of Mr. Samuel Cotton.


Mr. John Lucas, and Mr. John Parkinson, the Respondent's English solicitors being severally examined, said, that the Appellant was engaged, employed, or retained, as the counsel, or legal adviser of the Respondent, for the first time in the year 1820, and so continued such counsel or legal adviser till August, 1831, and was not so employed after that period, or until any period in the year 1832; and that as such counsel, the Appellant became acquainted with the said claims and demands of the said E. L. Mackmurdo, against the Respondent, and had copies thereof laid before him, and particularly that the draft of a *post obit* bond for 3570*l.*, payable six months after the decease of Mrs. E. B. Palmer, from the Respondent, and his son William Henry Roger Palmer, to the said E. L. Mackmurdo, in satisfaction of his said claims, was laid before the Appellant for perusal, in or about 1827, which treaty was afterwards interrupted, and never carried into effect, and all further treaty for the same ceased in July 1831.

The cause was heard on the 8th day of November, 1836, before the Lord Chancellor of Ireland, when his Lordship was pleased to declare the Appellant entitled to the sum of 2400*l.*, with interest, according to the terms of the offer made by the Respondent to the Appellant, by notice of the 24th of December, 1834, and his taxed costs as between party and party, up to the service of the notice of the 24th of December, 1834, provided the Appellant should elect, to accept the same, and declare such his election by written notice, to

1837.

CARTER
v.
PALMER.

1837.


 CARTER
 v.
 PALMER.

be served on the Respondent's solicitor in the cause, within two months from that day; and in such case, the Respondent to be entitled to his costs in the said cause to be taxed as between party and party, from the time of the service of the said notice, of the 24th of December, 1834; and that an account should be taken of the sum due to the Appellant on foot of the said principal sum of 2400*l.*, with interest and costs, and also of the sum due to the Respondent, on foot of the said costs; the latter sum to be deducted from the former, and the Appellant to be entitled to be paid the balance to be found due to him on foot of such account, by a transfer of so much of the sum of 6158*l.* 8*s.* 4*d.*, 3½ per cent. stock, remaining in bank to the credit of the said cause; and it was further decreed, that the Appellant should only hold the said judgment and deed of covenant assigned to him, as securities for such sum as should be found due to him as aforesaid, and should execute an assignment or release of the said securities to the Respondent at the costs of the Respondent; and that thereupon the Accountant-general should transfer to the Respondent the balance of such money as should be in the funds, or in the bank, to the credit of the said cause: and in case the Appellant should decline or omit to declare his willingness to accept such terms, then that the Appellant's bill should stand dismissed, with costs. And in such case the Accountant-general should transfer to the Respondent the entire of the sum of 6158*l.* 8*s.* 4*d.*, and also such cash as might be in the bank, to the credit of the cause.

The Appeal was against this decree.

For the Appellant, Mr. *Pemberton* and Mr. *Knight*.

1837.

CARTER

v.

PALMER.

The Respondent has not established by any evidence the issue raised by his answer ; viz., that his treaty for a compromise with E. L. Mackmurdo, was nearly concluded in the beginning of the year 1832 ; and that the Appellant had been in treaty with E. L. Mackmurdo, before the death of E. Budworth Palmer ; which issue is contradicted by all the witnesses of the Respondent who have been examined by him to that supposed fact.

The Appellant did not make any proposal, or commence any treaty, with E. L. Mackmurdo, until after the death of E. Budworth Palmer, in May, 1832, nor until some time after the Appellant had been discharged by the Respondent from being his counsel or legal adviser.

The Appellant, at the time of his negotiation with E. L. Mackmurdo, was not the counsel and professional adviser of the Respondent ; and did not violate any trust or confidence reposed in him.

At the time when the Appellant first opened such treaty, and from that time until the completion thereof by execution of the assignment to him, on the 3d of August, 1833, there was no treaty pending between the Respondent and E. L. Mackmurdo for a compromise of the claims of E. L. Mackmurdo ; and therefore the Appellant did not act unjustly in interfering with E. L. Mackmurdo, for the purchase of the bond, and procuring the assignment thereof.

For the Respondent, Mr. *Tinney* and Sir *W. Follett*.

1837.

CARTER
v.
PALMER.

In this suit there may be no need to question the original securities. It is a defence which impeaches the right of the Appellant to enforce them. He was confidentially employed, as counsel, to advise the Respondent with regard to these securities, and cannot be permitted to use the knowledge which he acquired in that character to obtain a benefit for himself by a purchase which is injurious to his employer. Exp. *James**, *Coles v. Trecothick†*, *Beer v. Ward‡*, *Cholmondeley v. Clinton.§* The bill is for a specific performance, by the Respondent, of a covenant to assure; but that relief is in the breast of the Court, and if it appears that the Appellant has acted contrary to equity the relief may be refused. It is argued, that the confidential relation of the Appellant had ceased when he made the purchase; but having acquired the knowledge in that character he can never afterwards make use of it to the prejudice of his employer. *Fox v. Mackreth.¶* Suppose a trader, under embarrassment, is desirous of compromising for his debts, and he employs an attorney to manage the affair, could the attorney buy up the debts for himself? *Lees v Nuttal.¶¶* It is doubtful whether there is any debt at all; and if so, what is the amount of it? **

July 15.

The Lord Chancellor.—In this case it appears, that William Henry Palmer, in the year 1816, executed a bond to a person of the name of Shep-

* 8 Ves. 337.

† 9 Ves. 234.

‡ Jacob, 77.

§ 19 Ves. 261. 4 Bli. O. S.

¶ 2 B. C. C. 400.

¶¶ 1 Russ. & M. 53.

** See *Exparte, Bennet*, 10 Ves. 381. *Lord Kingsland v. Barnewall*, 4 B. P. C. 154. *Norris v. Le Neve*, 3 Atk. 98.

pard, and he at the same time executed a deed of covenant, by which he charged real estates belonging to him with certain sums due from him. Mr. Carter, the present Appellant, was professionally employed for Mr. Palmer, and afterwards he purchased the charge upon the Respondent's estate; and the question which was discussed at your Lordships' bar, was, whether Mr. Carter from his connection as professional agent, and being employed by Mr. Palmer, was incapacitated from purchasing that charge on the estate of the person for whom he was so concerned. The case came before the Court of Chancery in Ireland; and it appeared from the answer of Mr. Palmer, that he was willing to pay a certain sum, not the amount of what was alleged to be due on the charge; but he said he was willing to pay a certain sum to Mr. Carter, being the sum which Mr. Carter had paid for the purchase from the person in whom the incumbrance was then vested. The decree which was pronounced by the Lord Chancellor of Ireland, was in these terms: — the Court declared “ The
 “ Appellant entitled to the sum of 2400*l.* with in-
 “ terest, according to the terms of the offer made by
 “ the Respondent to the Appellant, by the notice
 “ of the 24th of December, 1834, and his taxed
 “ costs, as between party and party, up to the service
 “ of the said notice of the 24th of December, 1834,
 “ provided the Appellant should elect to accept
 “ the same, and declare such his election by written
 “ notice, to be served on the Respondent's solici-
 “ tors in the cause, within two months from that
 “ day; and in such case the Respondent to be enti-
 “ tled to his costs in the said cause to be taxed,
 “ as between party and party, from the time of the

1837.

CARTER
 v.
 PALMER.

1837.

CARTER
v.
PALMER.

“ service of the said notice of the 24th of Decem-
“ ber, 1834.” Now it is quite obvious what the
intention of the Court was in making that provi-
sion ; one party, the Defendant, had said he was
willing to pay a certain sum which was less than
the amount of what the Plaintiff claimed, and the
object undoubtedly was to give the Plaintiff the
option of having that sum, merely to give him the
opportunity of accepting the sum tendered ; but
I apprehend, however meritorious the object, that
it was not consistent with the forms of the pro-
ceedings in a court of equity to make that part
of the order ; the parties might settle that between
themselves : but it was not proper or regular to
make that a part of the decretal order. Then the
decree goes on : “ In case the Appellant should
“ decline or omit to declare his willingness to
“ accept such terms as aforesaid, then that the
“ Appellant’s bill should stand dismissed, with costs
“ against the Appellant.” Whether Mr. Carter
was or not in a situation to buy up this incumbrance
on Mr. Palmer’s estate is a question which in the
view I take of this case it is not necessary for your
Lordships to give a decision upon, inasmuch as it
appears to me that the form of the decree is not
such, as under the circumstances of the case it
ought to have been. It appears that Mr. Carter
had bought up the incumbrance, he had bought up
the incumbrance for a less sum than was due upon
it. Now that he was entitled to something out of
the estate is beyond all question ; because the
party, the owner of the estate, owed the debt ; and
the only way in which the owner of the estate could
compel Mr. Carter to take less than the amount of
the incumbrance on the estate was on this ground,

that inasmuch as he was employed as agent for him, equity would not permit an agent dealing with a debt charged on his client's or employer's estate to take a benefit to himself; and the client or employer is in such cases entitled to say, "If you buy up that debt on my estate, I must pay you what you have paid; but I have a right to consider the purchase as made on behalf of the owner of the estate." But that is an equity which the party, the owner of the estate, must enforce against the agent, it is not an equity which will entitle the owner of the estate to refuse to pay anything in respect of that demand. The decree as pronounced by the Court of Chancery in Ireland, dismissed the bill; it therefore does not say whether he is to receive the whole, or so much as he has paid; but the effect of it is to deny all relief and payment to the person in whom this charge is legally vested. I apprehend the course which a court of equity ought to have taken would have been, not to have dismissed the bill, but to have given effect to the charge to the extent of making such a decree as the party was entitled to; but to make it so as to give the Defendant, the owner of the estate, an opportunity of asserting his equity; that equity being, to consider the purchase of the charge as a purchase for the benefit of him the owner of the property. That ought to have been done by a cross bill; they seem very much to have mistaken their way in the proceedings of the Court of Chancery in Ireland. The object of your Lordships would be to give them an opportunity of setting themselves right; and the way in which your Lordships may effect that object would be to reverse the decree dismissing the bill, and in lieu of that decree of dismissal to direct that

1837.

CARTER
v.
PALMER.

1837.

CARTER
v.
PALMER.

there shall be a reference to the Master to enquire what was due in respect of the charge on the property, created by the deed of the 30th of July, 1816, at the date at which Mr. Carter purchased the charge, without prejudice to any bill which the owner, Mr. Palmer, may file against Mr. Carter, the agent. If it is the duty of a court of equity to make a decree, it is impossible to make a decree which shall be less injurious to the future rights of Mr. Palmer than that which I have suggested, inasmuch as there will only be an inquiry to ascertain what was due on the charge; and if Mr. Palmer thinks proper to raise this question against Mr. Carter, he will have the opportunity, before the cause comes to that state in which payment will be awarded to Mr. Carter, of contending that he is only entitled to the purchase-money which he paid for the charge on the estate.

Decree reversed.

1837.

GARLAND
v.
CARLISLE.

ENGLAND.

(EXCHEQUER CHAMBER.)

GEORGE GARLAND, Esq. *Plaintiff in Error ;*

THOMAS CARLISLE, As-	} <i>Defendant in Error.</i>
signee of the Estate and	
Effects of GEORGE VA-	
LENTINE LEONARD, a	
Bankrupt, - -	

In an action of trover, brought by the assignees of a bankrupt against a sheriff to recover the value of goods seized under an execution, the following facts (among others) were found by special verdict :—

On the 16th of December, 1824, a writ of *fiери facias* against L., and at the suit of P., was delivered to the under sheriff. On the 17th of December, the goods on the premises of the debtor were seized. On the 24th of December, in consequence of an arrangement between the debtor and creditor, the execution was withdrawn; and, under the agreement, the goods were removed by the direction of W., an agent for the attornies of the execution creditor. How they were disposed of does not appear; but the fees, poundage, &c. of the sheriff's officer were paid. On the 8th of January, 1825, a commission of bankruptcy issued against L., founded on an act of bankruptcy committed on the 15th of October, 1824. It did not appear that the sheriff at the date of the seizure had notice that an act of bankruptcy had been committed. On the 29th of January, the usual assignment of the bankrupt's estate and effects was made to the Plaintiff. The action was brought in June, 1825, and a verdict found for the Plaintiff: upon a new trial, a special verdict was found, comprising the facts before-mentioned.

Upon argument of the special verdict, the Court was of opinion,
1. That there was a sufficient conversion by the sheriff whereon to maintain the action of trover.

1837.

—
GARLAND
v.
CARLISLE.

2. That the sheriff was liable for such conversion, notwithstanding his total ignorance at the time that an act of bankruptcy had been committed; and judgment was given accordingly. Upon writ of error to the Exchequer Chamber, the judges being equally divided in the opinions, the judgment stood; and upon further writ of error to the House of Lords, the judgment was affirmed.

THIS writ of error was brought by the Plaintiff in error, to reverse a judgment of the Court of Exchequer Chamber, of Michaelmas term, 1833.

The action was in trover, brought in his Majesty's Court of Common Pleas, by Thomas Carlisle, the Defendant in error, as assignee of the estate and effects of George Valentine Leonard, a bankrupt, against George Garland, Esquire, the Plaintiff in error, late sheriff of the county of Dorset.

The cause was tried before Mr. Justice Little-
dale, at the Summer assizes at Dorchester, in the
year 1825, when a verdict was found for the Plain-
tiff. Damages 450*l*.

This verdict was set aside; and upon a new trial, before the same learned Judge, the jury found the following facts by a special verdict: —

“ That the within named George Valentine Leonard, at the time of the committing the act of bankruptcy, and the issuing of the commission hereinafter mentioned, was a trader within the intent and meaning of and subject to the statutes made and then in force concerning bankrupts; and that there was then a good petitioning creditor's debt: That the said George Valentine Leonard, on the 15th of October, 1824, committed an act of bankruptcy: That on the 15th of December, in the same year, a writ of *fiери facias* issued out of his Ma-

est's Court of King's Bench, tested the last day of Michaelmas term preceding, returnable on Monday next, after eight days of St. Hilary then next, and directed to the sheriff of Dorset, commanding him, that of the goods and chattels of the said George Valentine Leonard, he should cause to be levied as well a certain debt of 604*l.*, which Joshua Payne had recovered against him in the Court of King's Bench, as also 65*s.* for his damages, as well by reason of the detaining of that debt, as for his costs and charges; which said writ was endorsed to levy 306*l.* 1*s.* 6*d.*, besides sheriff's fees, poundage, officers' fees, and all incidental expenses: That on the 16th day of the same month of December the said writ was delivered to Mr. William Parr (at that time under-sheriff to the Defendant, who was then sheriff of Dorset,) by John Williams, an agent of the said Joshua Payne, together with a letter from Green and Ashurst, his attorneys; a copy whereof is as follows: —

1837.

 GARLAND
 &
 CARLISLE.

“ Sambrook Court, Basinghall Street,
 “ 15th December, 1824.

“ Sir,

“ The bearer, Mr. Williams, will deliver a writ
 “ of *feri facias* to you, which we have issued
 “ against the goods of Mr. George Valentine
 “ Leonard, and upon which you will be pleased
 “ to grant a warrant to an officer living near to
 “ Lyme. We authorise you and the officer to take
 “ Mr. Williams's directions on the subject of this
 “ execution, and to withdraw from possession if he
 “ shall think fit to request you so to do.

“ (We are)

“ Mr. Parr.”

“ Green and Ashurst.”

1837.

CARRAN

CARRAN

And on the 17th of that month the Defendant issued his warrant, directed to William Restarick, his bailiff, reciting the said writ, and commanding him to levy of the goods and chattels of the said George Valentine Leonard, as required by the said writ, that the said sheriff might have the money as by the same he was commanded: That the warrant was, by the said John Williams, the agent of the said Joshua Payne, delivered to the said William Restarick, together with a letter from the said William Parr, as under-sheriff as aforesaid, to the said William Restarick; a copy of which is as follows: —

“ Payne v. Leonard.

“ Sir, “ Poole, 16th December, 1824.

“ Inclosed is a warrant to levy on the Defendant’s property, which I send you by Mr. Williams, whose directions you will take in the execution of the warrant; and if he requests you to withdraw the execution, you will do so on his giving you a written authority.

“ Wm. Parr.”

Who afterwards, on the 17th of December, in the year last aforesaid, entered the said George Valentine Leonard’s house and premises at Lyme, in the county of Dorset, and there seized and took divers goods in the declaration mentioned, which were the goods of the said George Valentine Leonard, but which, by the subsequent commission of bankruptcy and assignment, became the property of the Plaintiff, by relation from the act of bankruptcy, of the value of £50*l*., under and by virtue of the said writ, putting Robert Gascoigne, his assistant,

in possession, and leaving with him the warrant, and kept possession of the same till the 24th of the same month: That whilst said Robert Gascoigne was so in possession, as the assistant to the said William Restarick, divers goods, parcel of the said goods in the said declaration mentioned, of the value of 445*l.*, which were the goods of the said George Valentine Leonard, but which, by the subsequent commission of bankrupt and assignment, became the property of the Plaintiff, by relation, from the act of bankruptcy, were made up into thirteen packages, which the said William Restarick understood were packed for the purpose of satisfying the levy, in pursuance of an arrangement made between the said John Williams and the said George Valentine Leonard, eight of them to pay the debt due from the said George Valentine Leonard to the said Joshua Payne, and the remaining five of them to be sold by the said Joshua Payne, for the sheriff's poundage, officers' fees, and other expenses, which the said John Williams, as such agent, should have incurred, or might incur, in and about the said levy, the surplus balance to be remitted to the said George Valentine Leonard; the greatest part of these goods had been originally purchased, by the said George Valentine Leonard, of the said Joshua Payne, but some few of the goods, so purchased, having been sold, the value of them was made up out of the said George Valentine Leonard's stock, but the said Joshua Payne had not, by this arrangement, any more than his just debt: That after such arrangement had been so made between them, on the 24th of the same month of December, the said John Williams, agent for the said Joshua Payne, delivered to the said

1837.

GARLAND

v.

CARLISLE.

1837.
GARLAND
v.
CARLISLE.

William Restarick two letters, one dated the 23d of December, signed by the said George Valentine Leonard, and directed to the said William Restarick, as follows:—

“ ‘ I request and empower you to take goods instead of cash, to the amount of the levy in the above cause.’

“ And the other, dated Lyme, 24th of December, 1824, signed by John Williams, as follows:—

“ ‘ I hereby authorise and request you to quit possession, the Plaintiff having been satisfied the whole debt and costs in this action.’

“ The execution was afterwards, on the last-mentioned day, wholly abandoned; and the said Robert Gascoigne, and the said William Restarick, quitted the premises of the said George Valentine Leonard, leaving all the said goods thereon; the said Robert Gascoigne going to Bridport, and taking the said warrant with him, and the said William Restarick to the Cups Inn at Lyme: That, two hours after, the said John Williams, the agent of the said Joshua Payne, came to the said William Restarick, at the Cups Inn, to settle with him for the sheriff’s poundage, and his, the said William Restarick’s, expenses for inventory, holding possession, levying, and other expenses, which was done, and was the first time they had been adjusted; and the said John Williams paid to the said William Restarick the whole thereof except five pounds, which he did not pay. He, the said John Williams, and the said William Restarick, agreed that the said John Williams should cause goods, to the amount of five pounds, to be packed up, and send them to Bridport to the said Restarick, to be deposited with,

and kept by him, till the said five pounds should be remitted to him.

“ That a quantity of goods of the value of five pounds, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the said bankrupt by Dudley, and by Farrant, a shopman of the said bankrupt, and sent to the Cups Inn, and was afterwards, on the following Monday, the 26th of December, in the same year, received by the said William Restarick, at Bridport, by the Lyme carrier: That the said five pounds were, about two months after, paid to the said William Restarick, who forwarded the said package of goods, about the same time that the money was paid, by the van, to London, to the said Joshua Payne: That the said William Restarick, at the time he received the same quantity of goods, knew that they were part of the goods which had been so seized as aforesaid. That the said thirteen packages of goods were, after the said execution was so abandoned as aforesaid, on the same day, sent by the said John Williams, as such agent as aforesaid, from the said house and premises of the said George Valentine Leonard, to the Cob at Lyme, each of them being marked with the letters I. P., being the initials of the said Joshua Payne’s name, and thence shipped for London, addressed I. P., Carpenter Smith’s Wharf; and were directed, by the said John Williams, to be sent to 34. Old Change, for Joshua Payne. They were sent, together with four other packages of goods (which had been sent to the Cups some days before the execution, and are not the subject of the present action) making seventeen packages in the whole: That they

1837.

GARLAND

V.

CARLISLE.

1837.

GARLAND
v.
CARLISLE.

were landed, on their arrival in London, at Carpenter Smith's Wharf, whereof Richard Wilson was the wharfinger: That, on the 8th day of January, 1825, a commission of bankrupt issued against the said George Valentine Leonard, under which he was, on the 14th of the same month, declared a bankrupt: That, on the 29th of the same month, an assignment of the estate and effects of the said bankrupt was made by the commissioners under the said commission to the said Plaintiff. That in the beginning of February, 1825, Mr. Henry Ball asked the said Richard Wilson, if he would deliver the said seventeen packages of goods to him? who said, certainly not, until it was ascertained in a court of law to whom they belonged; and they still remain at the said wharf, in his possession: That on the 15th of June, 1825, at Poole, in Dorsetshire, the said Plaintiff demanded the goods mentioned in the declaration of the said Defendant, who referred him to Mr. Parr, his under-sheriff: That the said Plaintiff soon after, seeing the said Defendant and the said Mr. Parr together at Poole, in the said county of Dorset, asked the said Mr. Parr, in the presence of the said Defendant, whether it was his, the said Mr. Parr's intention, to comply with the terms of the same demand or not? to which the said Mr. Parr answered, 'No, certainly not.' But, whether or not upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said Defendant is guilty of the premises within mentioned, within laid to his charge, or any part thereof, in manner and form as the said Plaintiff hath within thereof complained against him, the jurors aforesaid are altogether ignorant; and

thereupon they pray the advice of the Court of our said Lord, the King of the Bench ; and if upon the whole matter aforesaid it shall seem to the said Court that the said Defendant is guilty of all the said premises, then the jurors aforesaid, upon their oaths aforesaid, say, that the said Defendant is guilty thereof in manner and form as the said Plaintiff hath within thereof complained against him ; and, in that case, they assess the damages of the said Plaintiff, by him sustained by reason of the same premises, besides his costs and charges by him about his suit in this behalf expended, to 450*l.*, and for those costs and charges to 40*s.* And if, upon the whole matter aforesaid, it shall seem to the Court that the Defendant is guilty of the said premises, as to the said goods so packed up and sent to the said William Restarick, at Bridport, then the jurors aforesaid, upon their oath aforesaid, say, that the said Defendant is guilty thereof in manner and form as the said Plaintiff hath within thereof complained against him ; and, in that case, they assess the damages of the said Plaintiff, by him sustained by reason of the said last-mentioned premises, besides his costs and charges by him about his suit in this behalf expended, to 5*l.*, and for those costs and charges to 40*s.* But if upon the whole matter aforesaid it shall seem to the Court that the said Defendant is not guilty of the same premises, then the jurors aforesaid, upon their oath aforesaid, say, that the said Defendant is not guilty thereof in manner and form as he hath within in pleading alleged.”

This special verdict was argued before the Court of Common Pleas, in Hilary term, 1831, and the

1837.
GARLAND
v.
CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

Court delivered their judgment in favour of Thomas Carlisle, the Defendant in error.*

On the 16th of May, 1832, the judgment was signed, and entered on the Roll.

On the 10th of August, 1832, a writ of error to reverse this judgment was brought into the Exchequer Chamber by George Garland, esquire, the Plaintiff in error; and he assigned for error, as follows:—

“ That in the record and proceedings aforesaid,
 “ and also in giving the judgment aforesaid, there
 “ is manifest error in this, to wit, that the declara-
 “ tion aforesaid, and the matters therein contained,
 “ are not sufficient in law, for the said Thomas
 “ Carlisle to have or maintain his aforesaid action
 “ thereof against the said George Garland; there
 “ is also error, in this to wit, that, by the record
 “ aforesaid, it appears that the judgment aforesaid,
 “ in form aforesaid, was given for the said Thomas
 “ Carlisle against the said George Garland, where-
 “ as by the law of the land the judgment ought to
 “ have been given for the said George Garland,
 “ against the said Thomas Carlisle; and the said
 “ George Garland prays, &c.”

To which assignment the Defendant in error joined.

The special verdict was argued before the Court of Exchequer Chamber, on the 17th of June, 1833; and, on the 26th of November, 1833, that Court affirmed the judgment of the Court of Common

* The arguments of counsel and the judgment of the Court of Common Pleas on this special verdict are reported in the seventh volume of Bingham's reports, page 298.

Pleas in favour of Thomas Carlisle, the Defendant in error.*

Upon this judgment the Plaintiff in error brought a writ of error returnable before Lords in Parliament ; and assigned for error, as follows :

“ That in the record and proceedings aforesaid,
 “ and also in giving and affirming the judgment
 “ aforesaid, there is manifest error in this, to wit,
 “ that, by the record aforesaid, it appears that the
 “ judgment aforesaid, given by the said Court of
 “ our Lord the King of the Bench, at Westminster,
 “ before the Right Honourable Sir Nicolas Conyng-
 “ ham Tindal, Knight, and his companions, then
 “ his Majesty’s Justices of the Bench, at West-
 “ minster, in the county of Middlesex, was given
 “ for the said Thomas Carlisle, assignee, as afore-
 “ said, against the said George Garland, whereas,
 “ by the law of the land, the said judgment ought
 “ to have been given for the said George Garland
 “ against the said Thomas Carlisle, assignee, as
 “ aforesaid ; therefore in that there is manifest
 “ error : there is also error in affirming the said
 “ judgment, because he says that the judgment
 “ aforesaid was affirmed in the Court of our Lord
 “ the King of the Exchequer Chamber, at West-
 “ minster, before the Justices of our Lord the
 “ King, assigned to hold pleas in the Court of our
 “ said Lord the King, before the King himself,
 “ and the Barons of the Exchequer of our said
 “ Lord the King of the degree of the coif, whereas
 “ no such affirmance of the said judgment ought

* The judgment of the Court of the Exchequer Chamber, delivered by the several learned judges, will be found in the third volume of Tyrwhitt’s reports, page 705, and in the second volume of Crompton and Meeson’s reports, page 31.

1837.

GARLAND
v.
CARLISLE.

“ to have been given thereupon ; but, by the law
“ of the land, the said judgment ought to have
“ been reversed, therefore in that there is manifest
“ error ; and the said George Garland prays, &c.”

To which assignment the Defendant in error joined.

The printed reasons * in support of the Plaintiff in error’s case, were as follows : —

The facts stated in the special verdict do not show a sufficient conversion to entitle the Plaintiff to sustain the action, inasmuch as the sheriff did no more than seize the goods. His interference never went beyond the mere seizure. It terminated when the execution was withdrawn, and before there had been any conversion of the goods. From the moment when the execution was withdrawn, he ceased altogether to have any thing to do with the matter. By the act of withdrawing the execution, the possession of the goods was restored to the bankrupt ; and the subsequent dealings with the goods were the acts of the bankrupt and of Payne, by his agent, Williams ; and to those acts the sheriff was no party. If even there was a conversion of the goods by the sheriff, he acted in total ignorance that any act of bankruptcy had then been committed by Leonard. And, although the Plaintiff in the execution is bound by relation back to the act of bankruptcy, the sheriff is in a wholly different situation, inasmuch as he acts, not of his own accord, or for his own benefit, but as a public officer of the crown, and in strict obedience to the king’s writ ; and he ought, therefore, to be protected by his official character, if he acts igno-

* The arguments of counsel and authorities cited did not differ materially from those in the Courts below.

rantly and innocently, and not to be made answerable as a wrong-doer, by subsequent events, for that which, at the time he did it, it was not only lawful, but his bounden duty to do, and which he would have had no excuse for refusing, and could not have refused to do.

For the Defendant in error, the following reasons were assigned : —

Supposing that in this case there had been a regular execution of the writ by the sheriff (the Plaintiff in error), it is contended that the property of the bankrupt, the said George Valentine Leonard, became the property of the assignee (the Defendant in error) by relation from the time of the act of bankruptcy, and consequently the property seized was not that of George Valentine Leonard, which the sheriff was directed, by the writ, to take, but the property of the assignee.

There is nothing in the statute 21 James I., c. 19. s. 9., or any other of the statutes relating to bankruptcy, which prevents this relation operating against a sheriff, as well as against the execution creditor, on whose behalf the seizure is made ; on the contrary, it remains as the decision of all the superior courts at Westminster, that the relation takes effect against the sheriff, and he is liable to an action of trover at the suit of the assignees, if he seize and sell the goods of the bankrupt before the commission with notice of the bankruptcy ; and it is contended, that the goods cannot be more or less the property of the assignees because the sheriff has, or has not, notice of the bankruptcy.

The action of trover is founded in property, and the amount to be recovered is limited by the

1837.


GARLAND
v.
CARLISLE.

1837.

—
GARLAND
v.
CARLISLE.

value of goods converted. The term wrongful conversion, which is sometimes said to be necessary to the support of an action of trover, implies only a civil wrong, and in no way infers the slightest moral or criminal wrong, but only that the property of another has been converted without the right to do so; nor is it easy to conceive that an execution creditor, who delivers a writ to the sheriff, directing him to seize the property of A. B., and in no other way interferes, can be guilty of any more wrongful conversion than the sheriff who, upon his own judgment, seizes, in supposed execution of that writ, the property which had been the property of A. B., but has become, by his bankruptcy, the property of his assignees. The term wrong doer, when applied in such a case to the sheriff, or the execution creditor, is subject to the same observation; it means no more than that he has, without any wrong intention, taken the property of another person.

But in whatever sense the action of trover considers the Defendant to be a wrong doer, and guilty of a wrongful conversion, it remains decided by all the courts that the sheriff may be such a wrong doer and guilty of such a wrongful conversion by relation; for if a sheriff have notice of the bankruptcy, but acting *bonâ fide* on the belief that no commission will be taken out, he seizes and sells the goods of the bankrupt, he must do it at the peril of answering it to the assignees: if no commission is taken out, he has done right; but if a commission should afterwards be taken out, an action of trover may be supported, and the sheriff will be made a wrong doer, and guilty of a wrongful conversion by relation.

As therefore the goods, the value of which is sought to be recovered, were, at the time of the seizure by the sheriff (the Plaintiff in error), the property of the assignee (the Defendant in error), and that such a relation may, and does, operate against a sheriff, and as there is nothing in the conversion necessary to support the action of trover but what may by law be attributed to a sheriff acting honestly and innocently, it is contended, on the part of the assignee (the Defendant in error), that the sheriff (the Plaintiff in error) has seized his goods, and wrongfully converted the goods in question in this action, and, consequently, is liable to this action of trover for the whole sum of 450*l*.

But it is contended, that whatever may be the general rule of law as to the liability of the sheriff, in this case the sheriff (the Plaintiff in error) acted irregularly, and has identified himself with the execution creditor, and is, consequently, not entitled to any protection.

For the sheriff (the Plaintiff in error), by the letter of his under-sheriff, directed the officer to take the directions of Williams (the agent of the execution creditor) in the execution of the warrant, and thereby it is contended Williams was made also the agent of the sheriff. In pursuance of that letter, instead of the officer proceeding in the usual course to a sale, while he (the officer) was in possession, the goods mentioned in the declaration were, under the directions of Williams, packed up in order to satisfy the levy, and the sheriff's poundage and officer's fees. The poundage and fees were afterwards advanced to the sheriff (the Plaintiff in error), so far as Williams had the means; and for the residue, that is the sum of 5*l*., the sheriff

1837.

GARLAND
P.
CARLISLE.

1897.

GARLAND
v.
CARLISLE.

(the Plaintiff in error), by his officer, kept a sufficient part of the goods, thus making himself a party to the arrangement, and he is afterwards made the means of transferring the goods to the execution creditor, by the letter of the 22d of December, signed by the bankrupt, and delivered by Williams, the agent of the execution creditor and of the sheriff, to the officer, requesting him to take goods instead of cash; and then, by the letter of the 24th of December, from the said Williams, the sheriff is requested to quit possession, the execution creditor being satisfied; and the goods are afterwards removed by the execution creditor to London, for sale. It is, therefore, contended, that what the sheriff did was not, at the time he did it, in strict obedience to the commands of the writ; it was not what the Court itself, if it could have acted, would have done; it was not at that time justifiable by the writ under which he acted: and, consequently, it is contended that he is answerable to the Defendant in error.

That the sheriff (the Plaintiff in error) having first lent himself to the execution creditor, in the manner before-mentioned, the execution was, as the jury have found, wholly abandoned; and consequently the said sheriff cannot now justify himself under a writ abandoned.

As to the goods of the value of 5*l.* which the officer held, on account of his fee, still after the commission, and then delivered to the execution creditor, it is contended that those goods do not come within the question raised as to the sheriff's liability, but the Defendant in error is clearly entitled to the 5*l.*, being the value of those goods.

But it is contended further, that the transaction

as to the 5*l.* explains the other part of the arrangement; and as the execution creditor advanced to the sheriff (the Plaintiff in error) the residue of the poundage and fees upon the security of the goods of the assignee (the Defendant in error), packed up for that purpose, with the knowledge of the said sheriff, and while they were in his possession, in pursuance of the directions of Williams, the agent of the execution creditor and of the said sheriff, he is equally responsible for the remaining goods.

For the Plaintiff in error, Sir F. *Pollock* and Sir W. *Follett*.

For the Defendant in error, and
Serjeant *Bompas*.

The case was argued before the House of Lords, the judges being present, in May, 1837. At the conclusion of the argument, the following questions were put by the House to the Judges:—

First,—“ Whether a sheriff seizing and selling
“ goods under a *fieri facias* was, in December, 1824,
“ liable in an action of trover, brought by the
“ assignees of the Defendant in the action in which
“ *fieri facias* was issued; such Defendant having
“ committed an act of bankruptcy before the seiz-
“ ing or selling of the goods, but no commission
“ having issued until after the sale?”

If this question be answered in the affirmative, then,

Secondly,—“ Whether such sheriff was liable, if
“ after seizing the goods he had permitted them
“ to be disposed of according to an arrangement
“ between the Plaintiff and Defendant in the action

1837.

GARLAND
v.
CARLISLE.

“ without proceeding to a sale, but under which
“ the sheriff received his poundage ?”

If the first question be answered in the negative, then,

Thirdly,— “ Whether such sheriff was liable if,
“ instead of selling the goods, he had concurred
“ in an arrangement between and the Defendant,
“ in the action under which the goods were deli-
“ vered to the Plaintiff in the action, in satisfaction
“ of his demand, the sheriff receiving his pound-
“ age ?”

The Judges desiring time to consider these questions, the further consideration of the cause was adjourned *sine die*.

On the 27th of June—the Lord Chancellor having informed the House that the Judges differed in their opinions upon the questions of law propounded to them—

It was ordered, that they do deliver their opinions upon the said questions *seriatim*, with their reasons.

On the 29th of June, the Judges delivered their opinions *seriatim*, as follows :—

Coltman J. The first question proposed by your Lordship is one which, after the conflict of opinion it has given rise to, cannot but be considered as of no ordinary difficulty.

The question refers to the state of the law in December, 1824, at which time the act 5 Geo. 4. c. 98. had passed, but had not come into operation, except for the special purposes referred to in the 133d section.

The decision of the matter in debate must therefore turn upon the previous statutes, especially that of 13 Eliz. c. 7 ; and on the course of decisions

which have taken place in reference to those statutes.

The first statute, that of the 34th and 35th year of Henry 8. c. 4., authorises the disposition of the bankrupt's property for satisfaction of his creditors, and gives the same effect to the transfer as if it were a conveyance by the bankrupt himself.

There is nothing in this act showing an intention that its enactments should have a retrospective effect.

The statute 13 Eliz. c. 7., after authorising the appointment of commissioners for managing and disposing of the bankrupt's estate, directs that every direction, order, bargain, sale, and other thing done by the persons so authorised, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, &c., and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts, had, made, or done, after any such person shall become bankrupt.

The object of this statute was undoubtedly to give the commissioners when appointed a retrospective power, so as to enable them to avoid incumbrances and transfers of the bankrupt's property happening subsequent to the act of bankruptcy.

To what extent and against what persons, this power was intended to operate is the main subject of the present enquiry.

The 9th section of the statute, Jac. 1. c. 19. has, not as it seems to me any very direct bearing on the present question. The lands of the bankrupt were at that time bound by a judgment from the day to which the judgment related; and when a writ of *fierti facias* issued, the goods were bound

1837.

GARLAND
v.
CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

from the *teste* of the writ of *fi. fa.*; the judgment in many cases was not for a just debt but for a penalty: the object of the clause was, to provide a remedy for these special inconveniences; but it applies only in terms to creditors, and appears to leave the liability of the sheriff where the former statutes had left it.

The material words of the statute of Elizabeth are, that every direction, order, &c. by the commissioners, shall be good against the offender or debtors, &c., and against all other persons claiming by, from, or under him by any act had, made, or done, after he shall become bankrupt.

It was stated by counsel at your Lordships' bar, if I rightly apprehend his argument, that the provision in question did not apply to judgment creditors, and that their case was not provided for till the statute of James: but I am not aware of any authority which bears out the position intended to be implied; viz., that the act of Elizabeth applied only to persons claiming under the bankrupt by some voluntary act or conveyance by him had, made, or done.

On the contrary, I conceive that an execution creditor has always been considered as falling within the fair scope and meaning of the words "claiming by, from, or under, &c."

He has no claim or title to the goods whatsoever, except what he derives from his debtor. It is because they belong to the debtor that he lays claim to them; and for that only reason he does not claim by an independent or paramount title, but by one subsequent—subordinate and dependent entirely upon the goodness of the debtor's title.

If any doubt could be entertained on this point,

it is to be recollected, that by the statute 21 Jac. 1. c. 19. s. 1. the provisions of the statute of Elizabeth are to be expounded in all things largely and beneficially for the aid, help, and relief of the creditors.

1837.

 GARLAND
 v.
 CARLISLE.

If such is the case with the execution creditor, what is to be said as to the sheriff?

The ground on which his case was sought to be distinguished in argument from that of the execution creditor was this, that he claimed nothing but to execute the King's writ, and could not strictly be said to claim any thing.

This mode of treating the subject seems to savour a little of verbal refinement, and strikes the mind with an impression as if it were more specious than solid; for it occurs at once to ask, if the sheriff claim nothing in the goods, why does he intermeddle with them at all? It seems to me that he does claim a right in the goods; namely, a right to seize, and sell them; and that right is derived out of the debtor's right to them. He may then, without any impropriety of language, be considered as falling within the description of a person claiming by, through, or under, the debtor, if such appear to be the intention of the act of parliament.

But if the general object and scope of the act would be satisfied by putting a different construction upon the clause, I do not think it would be doing any great violence to the language of it, if we were to say, that the act was intended only to apply to persons who claimed an interest in the goods for their own benefit.

The object of the act of parliament is, to promote an equal distribution of the assets amongst all the creditors. To effectuate this object, it is essential

1837.

 GARLAND
 v.
 CARLISLE.

that an execution creditor, who has laid hold, for his own use, of a portion of the fund, should be made to refund it.

But the case of the sheriff is different; he does not keep the money in his hands, he is a mere instrument of transfer; and it is by no means necessary, in order to carry out the object of the Bankrupt Laws, that he should be liable to pay back money which is no longer in his hands; the policy of the Bankrupt Laws is satisfied by holding, that the party to whom he has paid the money over is liable to refund it.

It seems to me, therefore, that although the words of the clause in question are large enough to include the sheriff, and do in their natural sense include him, yet that it may be construed in the more restricted sense without doing much violence to the terms in which it is expressed.

An argument in favour of the more restricted construction has been urged at your Lordships' bar, which appears to me of considerable weight.

It was said, that if after an act of bankruptcy committed, a debtor of the bankrupt having notice of the act of bankruptcy pays his debt, he will be liable to pay it over again to the assignees if a commission should afterwards issue; yet if he is sued before the commission issues, he cannot defend himself on the ground that an act of bankruptcy has been committed, and that a commission may issue. *Prichett v. Downe**, was cited in support of these positions; and *Foster v. Alanson*† is to the same effect. It was said, further, that if the bankrupt should sue for the debt and recover judgment,

* 3 Camp. 131.

† 2 T. R. 479.

and the debt should be thereupon paid by the debtor in satisfaction of the judgment, the assignees, under a commission subsequently issued, could not claim to be paid over again. The law was certainly so laid down by the judges in the above-mentioned case of *Foster v. Alanson* ; and has not, as far as I am aware, ever been called in question.

Here then is a striking exception to the universality of that rule of the Bankrupt Law by which all the property and rights of the bankrupt are by relation transferred to the assignees in all their entirety as they existed at the time of the act of bankruptcy.

On what principle does this exception rest? I am not able to find any satisfactory one other than that which was contended for in argument at the bar, that what the law compels a man to do, that it will, if possible, justify him in doing.

This principle is so entirely consistent with reason, and the plainest dictates of justice, that it ought not lightly to be departed from.

It cannot indeed be contended, that it is of force sufficient to controul the distinct and positive enactment of a statute ; but where a statute admits of two constructions, it may furnish an argument of considerable weight for the adoption of the one in preference to the other.

It is obvious that this argument, be its weight more or less, is directly applicable to the case of the sheriff. He is bound to obey the writ—he is liable to attachment if he does not.

In the construing of an act of parliament, some degree even of astuteness might be pardoned in endeavouring to avoid such a scandal to the law as must result ; where a man having been compelled to do a certain act, he is afterwards punished for

1837.

GARLAND

v.

CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

doing it, where he is compelled to pay either in purse or in person for having done an act which he had been compelled by a similar legal necessity to perform.

If these considerations had induced the courts of law to adopt what I have called the more restricted construction of the clause in question, I should have thought them well warranted in doing so; and it seems to me, that in the early cases the courts leaned to that construction: but I am constrained to say, that, in my judgment, the great body and weight of authority is on the other side. I do not propose to go in detail through the cases; they have already, on former occasions, been sifted with a degree of learning and care, which leaves nothing further to be said on either side the question: whatever conclusion may be come to with respect to the earlier decisions, which are for the most part but indifferently reported, it is indisputable that for many years back the decisions have been uniform that the sheriff is liable. The case of *Potter v. Starkie*, decided in the Exchequer in 1807, is of itself an authority of great weight; it was, as I have learnt from one of my learned brothers now present, having been himself a counsel for the Plaintiff, elaborately argued on behalf of the sheriff, by a most able, acute, and learned person (Sir John Richardson), and before judges perfectly conversant in the law applicable to the question in debate. It is stated in 4 M. and S. 260, that the decision in *Potter v. Starkie* was considered as following from the case of *Cooper v. Chitty*. But it is not to be understood from this statement, that the difference between the two cases escaped the attention of the bar and the bench. On the contrary, in the case

of *Lazarus v. Waithman**, Mr. Justice Richardson, when speaking of the case of *Potter v. Starkie* by the name of *Lyon v. Lamb*, informs us, that the difference between these cases and the case of *Cooper v. Chitty* was pointed out and insisted on; but that the Court held, that the property was changed, and vested in the assignees by relation from the time that the act was committed. This decision must therefore be looked upon as the deliberate judgment of the Court of Exchequer, expressly upon the point now in debate. That decision appears to have been acted upon by Lord Ellenborough, in 1813, in the case of *Wyatt v. Blaydes*.† It was followed, in 1821, by the Court of Common Pleas, in the case of *Lazarus v. Waithman*, and again, by the same court, in *Price v. Helyar*; and, in 1831, by the Court of King's Bench, in *Dalton v. Langley*.

Now, if it were admitted (which is open to some dispute) that the early decisions are at variance with the modern ones, the latter are so precise, and have now been considered for so many years as established law, that even if less capable of being upheld upon the express words of the statute than I think they are, they ought not now to be overturned.

The law is pre-eminently a tentative and a practical science; where there is a real grievance it never fails to shew itself, and usually either works out a remedy for itself, or is remedied by the legislature.

However great the anomaly may be (theoretically considered) in holding the sheriff liable in the case under consideration, the practical inconvenience has never been found to be very serious.

* 5 B. Moore, 19.

† 3 Camp. 396.

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND
v.
CARLISLE.

If the sheriff is called upon to pay over to the assignees money which he has already paid to the execution creditor, he may recoup himself at the expense of the creditor, or if before he has paid over the money he has good reason to apprehend a bankruptcy, he may apply to the party suing out the writ for an indemnity, or to the Court for time to return the writ.

How little of real practical grievance there is may be inferred from the well known fact, that the office of under-sheriff is in general request, and is looked upon as an office of emolument sufficient to countervail any risk it may bring with it.

The practical evil on the other hand is of no small amount, when the courts of law depart on any but the most solid grounds from an established course of legal precedents. The importance of certainty with respect to the rules of law ought never to be lost sight of. That important object can hardly be attained if the authority of decided cases is to be shaken by a perpetual recurrence to first principles, and upon doubts not bottomed in any great practical mischief.

These considerations have led my mind to the conclusion, that the answer to the first question proposed by your Lordships ought to be in the affirmative.

To the second question proposed by your Lordships, I answer also in the affirmative. The goods, by the supposition, having been seized by the sheriff, and being in his custody and power, they cannot be disposed of by the agreement of the parties without the permission of the sheriff; the disposing of the goods in this way without the consent of the sheriff, is, as against the assignees, a conversion of

the property, as much as if he had sold them by auction.

To the third question no answer is required, the first question having been answered in the affirmative.


In obedience to your Lordships' commands, I have considered the questions proposed to the Judges in this case; and I have now to state the opinion which I have formed. It can hardly be necessary for me in so doing to state, that I have formed it, and express it with real diffidence of my own judgment, when your Lordships' are aware of the difference of opinion which exists upon the subject among the highest legal authorities. I may add, however, that I have not only formed it with diffidence, but retain it not without some hesitation, on account of the difficulty I have at times found in reconciling all the legal principles which appear to me to be applicable to it.

Upon the best judgment which I have been able to form, I think your Lordships' first question should be answered in the affirmative. I believe that I shall be able to state my reasons for so thinking, at no great length: for I do not propose to review the authorities upon the subject. That has been already so fully and ably done at the bar, and in elaborate judgments, which are in your Lordships' hands, that I feel I should be taxing your Lordships' attention without the reasonable expectation of throwing any additional light upon that branch of the argument. Speaking in this house it seems to me enough to say, that the result of my examination of the cases is this — I do not find a balance of authority so preponderating, as to be absolutely conclusive on my judgment either way. Putting

1837.

GARLAND
v.
CARLISLE.

1837.


GARLAND
v.
CARLISLE.

however, the authorities which are in accordance with my own opinion at the very lowest possible estimate, and speaking of them in a way in which even those who differ from them cannot but concur, they are numerous, of great weight, entitled to high respect, and have been (which is most important) acquiesced in generally by the legal profession, and acted on for many years. If therefore I determine my own opinion independently of them, and upon principle alone, still they warrant me in the satisfactory feeling that I am not setting up that fallible opinion so formed against all the authority bearing on the case; and I profess to pray in aid these decisions, no farther as authority, though I shall use without scruple many of the arguments I find stated in them.

Considering this question as one that is to be answered upon principle, I ask myself, What are the principles to which I am to apply for an answer—and that raises the further point, What is the nature of the question itself? If it be a question of common law, in the absence of direct authority I must look to legal analogy; and considerations of moral right and wrong, of general expedience, or inconvenience, may be properly allowed to enter largely into the argument: although the process be in form for the discovery of the law, yet in the case supposed it is perhaps the province of the judge substantially rather to make it. If it be however a question of statute law, the inquiry becomes one of a much more restricted range: it is then in truth simply a question of construction; and none of those general considerations to which I have alluded have any place, except so far as they serve to illustrate the meaning of the language which the

Legislature has chosen to employ. And it is obvious, upon this principle, that where the legal, ordinary, and grammatical sense of the language is unambiguous, these considerations are wholly irrelevant—they cannot alter that sense, which must prevail: we must take the law as we find it; and if it be unjust, or inconvenient, we must leave it to the constitutional authority to amend it.

Now, this I think, is purely a question of statute law: it depends on the construction of a single section of a single statute—of the 2d sect. of the 13 Eliz. c. 7; for the 21 Jac. 1., in my opinion, does not apply: and there seem to me but two points for consideration:—First, Is the sheriff within the words of the statute, according to their legal ordinary and grammatical sense? Second, If so, is there any rule of law, resulting from his character as an officer of the Court, or from any other circumstance which exempts him from its operation?

By the 2d section of the statute above mentioned, the commissioners are empowered to take, by their discretions, order with the bankrupt's goods and chattels, to make sale of them, and otherwise order them for true satisfaction and payment of the creditors: and every such order, sale, and other things done by them, shall be good and effectual in the law, to all intents, constructions, and purposes, against the bankrupt, his wife, heir, children, “and against all other person or persons claiming by, from, or under the bankrupt, by any act or acts, had, made or done, after he has become bankrupt.” It is said, that the sheriff is not within these general words; for two reasons: First, That he does not claim by, from, or under the bank-

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND
v.
CARLISLE.

rupt. Secondly, That even if he does, it is not in consequence of any act done by the bankrupt.

With regard to the first, the argument at the bar relied on both parts of the proposition as being inapplicable to the sheriff; it was said, he was no claimant at all—he claimed nothing; and if he did, he claimed nothing under the bankrupt, but all under the writ. This argument I confess seems to me rather fanciful than sound; when the sheriff is either insisting upon his right to take or to hold the goods or the proceeds, or justifying the act he has done in the seizure of them, I do not know any general term more appropriate to describe his situation than that which the statute uses; and if the right to take or to hold depends, as no doubt it does, on the title of the bankrupt, surely he claims under him, although not by descent, conveyance, or any mode of voluntary transmission. If the execution creditor, who sets the sheriff in motion, claims under the bankrupt, if the sheriff's vendee of the goods, claims under the bankrupt (and it is not disputed that both do), can their case as to this be put upon any principle, which will not include that of the sheriff? Is it not, that you destroy their respective titles, if you shew that the goods were not the bankrupt's when seized?

But, secondly, it is said, that at all events the claim does not arise by virtue of any act done by the bankrupt. It is obvious to answer, that the statute says nothing of the act being done by the bankrupt: the words are “any act, or acts had, “made, or done, after any such person shall become “bankrupt.” Nor can I think that those words ought to be imported into the statute; if they were, the objection now relied on would apply not merely

to the sheriff but to the execution creditor, who yet is admitted to be within the clause; he does not claim necessarily under any act done by the bankrupt any more than the sheriff. If these words, "by the bankrupt," are not to be imported into the statute, the difficulty does not arise; for the issuing of the writ, the delivery to the sheriff, the seizure by him, are all acts done subsequently to the bankruptcy.

This section of the act of parliament has created the doctrine of relation as applicable to this subject matter; and it in effect vests the property in the bankrupt's goods in the assignees (who now, by subsequent statutes, stand in the place of the commissioners), from the date of the act of the bankruptcy. The words are quite general; in order to effectuate their purpose, they have been always held to over-ride every transaction with regard to the property from that date: into whose hands soever the goods may come, and through whose-soever they may pass, the property at every instant is in the assignees, so soon as their general title as such is complete. If at the moment of that event happening, the goods should be in the sheriff's hands, there is no doubt but that they might recover them from him; and if after notice of the assignment he were to sell, no one disputes his liability to answer to the assignees for such sale. It follows, therefore, that the sheriff is within the general words of the statute, although not mentioned expressly;—a circumstance this last, which somewhat diminishes the weight of an observation made at the bar, that he is not expressly named in any of the statutes, which have subsequently restrained

1837.

GARLAND
v.
CARLISLE.

1837.

—
GARLAND
v.
CARLISLE.

the period of relation to the act of bankruptcy within certain limits of time.

If then the sheriff falls within the general words of the statute, upon what ground are we to exempt him from their operation? I admit, that a case of great hardship is made out for him; and if we were at liberty to enter into that consideration, I confess, in the various arguments and judgments which I have heard and read on this point, no satisfactory answer has in my opinion been given. I cannot admit it to be such, that upon the whole the sheriff's poundage makes his office profitable and desirable; or that he is liable in trover only, or in assumpsit, in which the value of the goods is sought to be recovered, and not in trespass. But no lawyer maintains in terms, that the argument of hardship can be relied on where the meaning of the statute is unambiguous. Those therefore who contend, that the sheriff is not responsible, shape the argument differently: they rely on the ministerial character of the sheriff; that he acts only in strict obedience to the orders of the Court—whose officer he is, and whose judgment he executes, and is bound to execute. Reason and justice, and well recognised legal principles, they say, require that in so doing he should be borne harmless; that the relation to the act of bankruptcy is but a fiction of law, and must not be allowed to work wrong; and therefore, that however general the words of the statute are, they must be read with an implied exception as to him.

I state the argument very shortly, not from any wish to diminish its real strength, but because your Lordships are fully aware of all the particulars which are involved in the simple proposition,

that all that the sheriff does he does in the strict performance of his duty, and under orders ; still, as it seems to me, the substance of the case is merely hardship and unreasonableness ; and that the only grounds of law advanced cannot be safely relied on.

First, Is this doctrine of relation a mere fiction of law ? The statute-law in substance enacts that a trader, owing a debt or debts of a certain amount, and committing an act of bankruptcy, holds thenceforward his goods by a defeasible title ; and that, if a certain other event happens, his title shall be defeated from the date of such act of bankruptcy ; and this as regards not merely himself but every one claiming intermediately under him. In what sense is there any fiction here ? no fact is supposed to exist contrary to the truth : the assignees have no possession supposed to be in them at a time when it was actually in the bankrupt ; but the law making his title defeasible from a certain moment, avoids, in favour of the assignees, the title of all those who claim under him by any intermediate acts. The case of the disseisor and disseisee, put by the Ch. J. in *Liford's* case, 11 Co. 51 b., is an illustration in point ; by the disseisin the disseisor acquires the freehold against all the world—and among them the disseisee, so long as the disseisin continues ; but if the disseisee re-enter, as against the wrong-doer or his servants, the law supposes the freehold always to have remained in him, and he may maintain trespass for the fruits taken while he was disseised. Now this supposes a possession contrary to the fact ; and the law will not allow that to prevail against any one coming in by title *bond fide* under the disseisor ; but gives the whole remedy against him. Here is a fiction of law ; and therefore moulded by

1837.

GARLAND
v.
CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

law to meet the ends of justice : but if the act of the Legislature (upon which this part of the common law must in legal contemplation be supposed to vest) were now in the Statute-book, in order to effect its purpose its language must be very different from that of the statute now in discussion — instead of simply saying, that the disseisee's title shall prevail, it must have enacted what would on the face of it have appeared to be a fiction; namely, that as against the disseisor the disseisee after re-entry shall be deemed to have been seised and in possession at a time when he was notoriously not so.

I conceive, therefore, that this is not in fact any fiction of law; but, if it be, it is one enacted by the express words of the act of parliament, and therefore we cannot mould it, as we might a fiction of the common law. I may here revert to the case I have just put, and suppose the Legislature to have enacted, that as against all persons the disseisee after re-entry should be deemed to have been in possession, in that case, could any sense of hardship or injustice warrant the expounding of the law by holding that he might not maintain trespass for the mesne profits against the disseisor's vendee?

But, lastly, Can we read the statute with an implied exception in it in favour of the sheriff? I am aware of the lengths to which our predecessors in former times have thought themselves justified in going, when dealing with the concise language and general terms of ancient acts of parliament. I will not stop to inquire, whether in all the instances that might be cited their course was to be justified, or in precisely similar circumstances their example to be followed; but for one, I think the principle

which limits my duty in regard to the opposition of statutes of so late a date as those of Elizabeth so clear and paramount, that I shall never think myself justified in taking a case out of the operation of a statute, which falls within its plain and unambiguous language.

For these reasons—I fear imperfectly expressed, and less strong in themselves perhaps than may suggest themselves to other minds, but which I humbly submit to your Lordships—I beg to answer your Lordships' first question affirmatively.

I beg to draw attention to the precise words in which I lay down the rule for my own guidance: it is one thing to imply as written in a statute all that is absolutely necessary to give the written words and sensible operation; it is another to exclude any case, which the words in their ordinary legal and grammatical sense embrace; and this I may say in addition, that upon those who call on us to so do lies the *onus* of shewing that to include the case will defeat the intention of the Legislature, or at all events is not necessary to effect it. The former it is not pretended has been done here, and, in my opinion, the latter has not been made out; on the contrary, I see many reasons for thinking, that to prevent the various frauds which the doctrine of relation was intended to meet, it is wise to conclude the sheriff within its operation.

Second, The circumstances which differ this question from the former, appears to me not to distinguish it in principle, so far as regards the operation of the statute; and as regards the requisites for maintaining the action of trover, the seizing of the goods, with the permission to the Plaintiff and Defendant to dispose of them, whereby the

1837.

GARLAND
v.
CARLISLE.

1837.
GARLAND
v.
CARLISLE.

real owners are deprived of them, seem to me equivalent to the seizure and sale mentioned in the first question;—the sheriff makes himself party to, and therefore liable for a conversion. I therefore answer this question in the affirmative.

Williams J. In considering the answer to be given to the first, and by far the most material question proposed by your Lordships for our consideration, I, at first, doubted whether, after the many discussions which have taken place and the opinions already given, it might not have been sufficient to assume the authorities on each side to be equal, and to proceed at once to examine the subject, as if it had been *res integra*. I have been induced, however, upon further reflection, not to adopt that course, — not from a vain expectation of making any important addition to what has been already delivered, but, partly, because I, hitherto, have had no opportunity of giving any opinion upon the subject at all; chiefly, however, because the supposition above made would, as I think, place the question in a most unfavourable position for the Defendant in error. I am quite aware that the decisions of the Courts below are not binding upon the authority of your Lordships; but I do, also, presume that opinions here delivered are valuable in proportion as they embody in them and are founded upon those decisions. And, in this view of the case, notwithstanding the doubts which have been suggested—for which, considering the quarter from which they originated, I entertain a long-continued and most sincere respect—I must think that this question has been, theoretically and practically for upwards of

twenty years, without pretending to go further back, (I speak of the period from 1807 till 1829) as fixed and settled as almost any ever was or can be without receiving the final sanction of this House. I must refer to the cases more particularly, and (for the reason first mentioned) as shortly as possible hereafter; but, in confirmation of my assertion, I have to state that this question has been solemnly decided in the Court of Exchequer once, in the Common Pleas twice, and in the King's Bench once,—with this, that in the latter Court, upon the occasion alluded to, the point was declared to be so fully ascertained and finally settled, that argument was become superfluous, — and argument was *not heard*. To this, is to be added what Sir John Richardson (with, I believe, many others) observed in the case of *Lazarus v. Waithman**, “that the “law on this question has long been settled, and “and has frequently occurred of late years at Nisi Prius;” which observation would, if it needed it, receive confirmation from the experience of every one who has at all engaged in the practice to which the learned judge was alluding.

Having adverted, generally, to the decisions, it may not, perhaps, be out of order to proceed, at once, to an examination of them. The first in order is the case of *Potter and another, Assignees, &c. v. Starkie*, of which there was no printed report at the time, but of which some notice is to be found in 4 M. and Selw. 260, and also in Mr. Selw.'s treatise on the Law of Nisi Prius. It has, however, frequently been alluded to, and generally, for the purpose of receiving a ready and easy

* 5 B. Moore.

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND
v.
CARLISLE.

refutation, — viz. that it purported to proceed on the authority of *Cooper and another, v. Chitty**, whereas that authority, properly understood, is directly opposed to it. If the case of *Cooper v. Chitty* be founded on two principles; — 1st., that the property, upon assignment, vests in the assignees from the date of the act of bankruptcy, and 2dly, (as Lord Mansfield expressly puts it in one part of his judgment,) that the taking was not lawful, because they were *then* the goods of a third person, and so there was a conversion; then is the case of *Potter v. Starkie* in strict accordance with *Cooper v. Chitty*. If, however, the latter case (never denied to be law) can only be sustained by the sheriff having had notice of the bankruptcy when he sold, then the Court of Exchequer, though they agreed in the *decision* of *Cooper v. Chitty*, were opposed to that part of *the reason* for the judgment, and in my humble opinion rightly. Seeing, however, that the decision in *Potter v. Starkie*, is of some importance, having been upon a state of facts, which completely coincides with the present, I am desirous to furnish your Lordships with the best information that can be obtained in the absence of a contemporary printed report. I happened to be counsel in the cause, and have a note taken at the time, and, what is much more material, I have a note of my friend Sir John Richardson, who was opposed to me on that occasion. From the statement in that note it appears that all the acts of the sheriff were completed before he had any notice of the bankruptcy, and before the commission was sued out. It further appears that the exemption of

* 1 Burr., 20.

the sheriff *before notice*, was distinctly brought before the Court, upon the plea that he acted only in pursuance of his duty; and, on the other side, the immateriality of notice was pressed, and it was even urged that the observations of Lord Mansfield were entitled to less weight on this particular point, because there was no statement in the case of any notice to the sheriff *in fact*, but that the decision may well be sustained upon the other reasoning to be found in that judgment. It has been observed, that those cases, which are supposed to be the foundation of the argument for the Plaintiff in error, were not brought under the notice of the Court of Exchequer by Sir J. Richardson, who was not in the habit of doing things imperfectly. But the protection of the sheriff under the writ was expressly urged by him, and all the cases alluded to are cited and commented upon by Lord Mansfield in *Cooper v. Chitty*, which was itself made the subject of most minute and laborious inquiry and comment in the Court of Exchequer; so that it seems to me impossible that they could have utterly neglected the alleged authorities upon which one principal position contended for before them was made to rest; — and the more so, if (as *I believe*) time was taken to consider the decision. The cases to which I have been alluding are, of course, *Bayly v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davis*, upon which the judgment of the Court of Exchequer in the case of *Balme v. Hutton* is made so much to rest. But if the decision of *Potter v. Starkie* depends and mainly upon the distinction therein taken between trespass and trover, according to the report of Sir J. Richardson, which, from his general

1837.

GARLAND
&
CARLISLE.

CASES IN THE HOUSE OF LORDS

~~action~~, as well as the course which the discussion took, I have no doubt whatever is correct, how can it be supposed that the second of the three ~~cases~~ alluded to, which turned expressly upon the form of action (trespass) had been utterly overlooked by the judges? Upon the whole, if the decision had been one at Nisi Prius only, by Mr. Baron Wood, I should have thought it entitled to much consideration, when I bear in mind that few judges, of any time, can be named better stored with legal information generally, and absolutely none, who understood better the forms of actions, and their respective limits and boundaries; but when to this is added, that the very point, recently (and recently only) so much in agitation was brought immediately and directly under the consideration of the Court, I confess I must consider it not merely as a decision expressly in point, but, moreover, entitled to very great weight and authority.

The next case in order of time was that of *Wyat v. Blades*, in 1813, Lord Ellenborough C. J., in which the same point was ruled, and trover was held to be maintainable against the sheriff. It has been remarked upon this case, that the character of the sheriff, and his liability in that form of action was unnoticed, and it is for that reason that (although there was no decision) I mention it. It appears, from the Report in 3 Campbell, 396, that this observation is well-founded; and I believe it to have been unnoticed, simply because matters of constant occurrence and continued acquiescence pass without notice or observation, or, in the words of Mr. J. Richardson already referred to, "because the

law had long been settled, and the case had frequently occurred at Nisi Prius of late years." A report, at this time of day, would have somewhat of a whimsical appearance, if the object of it was to show, that "money had and received" is the appropriate remedy where a person holds the money of another which he is bound, by law, to pay over.

The next was the case of *Lazarus v. Waithman*, 5 B. Moore, Easter T. 1821. The point was decided by the Common Pleas, as it had been in the Exchequer. *Price v. Helyar* followed in 1828, with the same result: it is another decision upon the point in question. Lastly, came the case of *Dillon v. Langley*, Easter, 1831, 2 Barn. and Adolph. 131. The Report by no means gives an adequate account of the fixedness and settlement at which, in the opinion of King's Bench, the point now under consideration had arrived. I happened to be counsel in the cause, and am not likely very soon to forget what happened, particularly when I learnt, so soon after, what had occurred in the Court of Exchequer in the very Michaelmas Term following, as to the case of *Balm v. Hutton*. I am far from saying that I was prepared with an argument as ingenious as that contained in the elaborate judgment pronounced by Lord Lyndhurst in the Court of Exchequer, but this I must say, that I was prepared with all the authorities, upon which reliance is therein placed: Lord Lyndhurst, however, having first stopped the counsel on the other side, plainly intimated to me that the season for discussion was past, and, accordingly, having barely noticed two of the authorities alluded to, and particularly the main story of the Plaintiff in error,

1837.

GARLAND
&
CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

(*Bayly v. Bunning*,) which then produced no effect in that quarter of Westminster Hall, though it produced so much in another, within half a year, against me. I sat down unheard.

“Those decisions,” as Mr. Justice Taunton observed, (and I quote his words in consequence of the comment upon it,) “will be found to embrace
 “a very considerable period of time, and to have
 “been established in succession by all the Common
 “Law Courts in Westminster Hall; and the com-
 “mon practice, I believe, has been in uniform ac-
 “cordance therewith.” And, speaking of the case now before your Lordships and of the same decisions, he added, “I dread the consequences of a
 “decision of this Court in favour of the Plaintiff in
 “error. Certainty is of the first importance in
 “judicial proceedings, and the decisions during a
 “period of sixty years ought not to be disturbed by
 “fanciful innovations on the one hand, or the au-
 “thority of some doubtful, if not obsolete, decisions
 “on the other.” I am aware that this statement has been represented as an exaggeration; if, however, the case of *Cooper v. Chitty* may be maintained, independent of what is said by Lord Mansfield about notice, that period, or even a larger one, will be found more appropriate and accurate than the more limited one mentioned by me at the outset.

I purposely forbear adding to the list of decisions either the case now before your Lordships, or that of *Balm v. Hutton*, although the judgment of the Exchequer was raised by a majority of seven judges against one. I do so, because the doubt, which has given rise to them both, was first started, I believe, in the case of *Hartly and another v.*

Hornby, tried at Lancaster in the Spring Assizes, 1829. That was an action for money had and received, against the sheriff, who had levied after an act of bankruptcy, but had sold the goods and paid over the proceeds before the commission issued. The question came on before the Court of King's Bench, upon a motion to enter a nonsuit; and upon the discussion then ensuing, the doubt arose, to which I have alluded, and a difference of opinion; from which cause, as I presume, the case is not reported. I have, however, procured my brief from the agent of the attorney who instructed me, and there find a very full note of the argument. I shall not trouble your Lordships with any part of it, further than to mention that the learned counsel for the Defendant cited and expressly admitted the authority of the before-mentioned cases, establishing the liability of the sheriff in trover; and founded their argument entirely upon the fact, that the money had been paid over before notice of the bankruptcy, and that therefore that form of action could not be maintained. So settled, up to this time, was the question now proposed by your Lordships for our consideration.

I come now to the authorities which are opposed, or supposed so to be, to the long train of modern cases expressly and deliberately decided upon the point; the authorities I mean already referred to, on which the judgment of the Court of Exchequer mainly rested in the case of *Balme v. Hutton*, and to which, with some emphasis and appearance of assumed superiority, the title of the *older* authorities has been studiously applied. I am not aware that a case is, of necessity, better for being old; nor, I admit, is it worse, — but I make the admis-

1837.



GARLAND

S.

CARLISLE.

1837.


 GARLAND
 v.
 CARLISLE.

sion with a material proviso; viz. that it has not been impugned by subsequent decisions; for, if so, it is. Else, what is meant by expressions (in courts of law not unknown) of decisions over-ruled, and cases no longer law, which compose a list which it would be most inconvenient to enumerate?

The first of these old authorities is the case of *Bayly v. Bunning**, (reported also in *Siderfin and Keble*,) and, I may add, the only case, which purports to be in point, which has been decided by any court. To what authority this case is entitled from the state of the reports of it, — how far it is impaired by the quære in *Siderfin*, or its own intrinsic defects, I will not waste your Lordships, time by inquiring. I can make no addition to the comments which have been made by my learned brothers, with whose opinion, upon the main question, I agree. I will therefore only say, that if (and upon this point I shall endeavour to explain myself more fully hereafter) the fact of notice to the sheriff be not material, and, moreover, (as I think,) the case of *Cooper v. Chitty* may still be maintained as law, then, in my humble judgment, was this old case over-ruled very nearly three-quarters of a century ago, and remained dormant, until revived (your Lordships are to determine for what duration) by a decision of the Court of Exchequer in 1831.

The second case, *Letchmore v. Thorowgood*†, is not in point. It only decides that trespass will not lie in such case; — which leaves, untouched, the question, whether trover will lie or not: the distinction between them being not quite so nominal and unreal, as might be at first supposed: the

* 1 Levinz. 173.

† 3 Mod. 236.

damages in the latter being limited by the value of the goods seized, in the former they may be, what Mr. Justice Ashurst (in a case to which I must refer) calls “vindictive.” The expression must be rejected; because “vindictive” damages, in the ordinary sense of the term, cannot be heard of in courts of law; but, if it be understood to mean general damages upon the whole case, without any certain limit, the meaning may be adopted;—and that is sufficient for my purpose.

The third case is *Cole v. Davies*.* Your Lordships are aware of the comments which have been made by Lord Mansfield upon the authority of this report: into that discussion I decline to enter. Whether Lord Raymond was, at that time, as knowing as age ought to be, or as uninformed as youth sometimes is, I am wholly ignorant; but this I know, that it is *Nisi Prius* decision only; and (in imitation of the criticisms upon the modern decisions, as they have been called) I must add, without the slightest information of how the question was submitted to the learned judge, — whether with argument, or how much, or how little, or without any at all, — of this we have nothing. I now ask, with all respect, are these cases to be opposed to the dense body of authority arranged on the other side?

I pass on, however, to an important part of the present discussion, — I mean, the true import and bearing of the case of *Cooper v. Chitty*.

That Lord Mansfield did not conduct his argument throughout that judgment, without some variableness and shades of turning, I think must be admitted. From which cause it follows, that

* 1 Lord Raymond, 724.

1837.

GARLAND

v.

CARLISLE.

the case is seized as an authority both for the Plaintiff and the Defendant in error. I am extremely anxious to bring to a test before your Lordships the question, to which side the weight of its authority ought to incline.

Upon this point, I shall first inquire, Whether there be any ground, *in fact*, for those observations which Lord Mansfield has made respecting notice to the sheriff,—as the foundation *of the conversion*? and next, Whether, if there be no ground for those observations, the case may still be sustained?

That Lord Mansfield does say, at the conclusion of his judgment, “That the sheriff knew of the bankruptcy before the sale,” and derives an inference therefrom, is most certain: but, that there is no *fact* in the case to justify that assertion, is certain also; unless, indeed, the commission sued out and assignment thereon be notice in point of law. But, *how* is such commission notice; and from what time? the day it issues — or within a week; or at what time? I am aware of no authority which establishes that a commission is evidence of itself and for itself, of the time at which it issues. This, at least, I know, that in the case of *Lee v. Lopez**, where notice to the sheriff was considered material, the point to be ascertained, according to the language of the Court, was, not when the commission *issued*—as if imputing notice of itself—but when the sheriff *had notice* of the commission. If, then, the fact of the commission having issued was to be brought home to the sheriff, like any other fact; upon the statement of the case, *it was not*. If, then, there be no facts in the case to sustain the observations,

* 15 East, 230.

what is the result? Why, that, in my opinion, the judgment may be sustained for *other* reasons, which Lord Mansfield has given. In the report of the case in Blackstone, Lord Mansfield is made to say, “That if the sheriff had sold *immediately* after the seizure, he would have been liable.” If he did say so, I think he would have said truly; but I find that it is generally considered to be an error in that report. But how stands the case in Burrows? The concluding words of Lord Mansfield, in his judgment in the case of *Cooper v. Chitty*, have been quoted, and with great reliance. “The seizure here is after the act of bankruptcy, and, therefore, after the property was vested in the assignees; but that was excusable, and the sheriff shall not be made liable by relation, as a wrongdoer; the gist of this action is, the false return and sale long after the commission and assignment.” Passing by the diminished weight of these remarks from the doubt suggested, whether there be any fact to sustain them, let us see what else has been said in an earlier part of his judgment in the same report. I find these words: — “But the argument from these principles (cases are stated to have been commented upon, but the comments are not given,) is this, here the taking was *lawful*, and, therefore, the sheriff was bound to complete the execution by the sale. Answer; — the premises are not true; and, if they were, the consequence would not follow.” And then come these words, which I must think are hardly less material in a contrary direction: “The taking was not lawful, because then they were the goods of a third person.” So then, the taking was unlawful; and why? because it was the taking of

1837.

GARLAND
v.
CARLISLE.

1837.


 GARLAND
 v.
 CARLISLE.

the goods of a third person, — that is, of a person not named in the writ. And why is that unlawful? Because it is, when followed up by a sale, an unauthorized disposal of the goods of another, — which is another name for a conversion. But, beyond all this, for what purpose is notice necessary, and in what respect material? Is the property more or less in the assignees, according as there has or has not been, notice to the sheriff of attorney of the stages of the bankruptcy? Is it more or less the taking of their goods? And, accordingly, the learned and experienced counsel who argued this case at your Lordships' bar, expressly rejected the fact of notice, as wholly immaterial; and discussed the case, as if the Plaintiff in error had been fully affected by it.

If then the observations, at the conclusion of Lord Mansfield's judgment, upon which so much reliance has been placed, may be rejected, and the case is sustained without them, then must the case of *Cooper v. Chitty* be added to the authorities in favour of the Defendant in error. But if the fact of notice may be considered as existing in that case, from a commission having been sued out—and, moreover, that in order to constitute conversion in the sheriff, notice to him is necessary, though its materiality is now abandoned; still I agree with those of my learned brothers, who are of opinion that the case I am observing upon must be considered to be in favour of the Defendant in error. The late Mr. Justice Taunton (and with him several of the learned judges have coincided) thus expressed himself in the case of *Balme v. Hutton* :—
 “ I am pretty clear that an opinion grew up, that the
 “ sheriff was equally answerable in both cases (i. e.

“ with or without notice), that from the act of bankruptcy the property vests in the assignees; and that
 “ any sale or disposition of it afterwards, without
 “ their privity, must be a wrongful conversion, by
 “ whomsoever made.” I will only add, that this is precisely the view presented to the Court of Exchequer on behalf of the Plaintiff, in the case of *Potter v. Starkie*. On the case of *Timbrell v. Mills*, already referred to, I shall trouble your Lordships with no further remarks.

The case of *Smith v. Milles**, proceeds entirely upon the distinction between trespass and trover; and reference is made, in the considered judgments then pronounced, to the said cases of *Thorowgood v. Letchmore*, and *Bayly v. Bunning*; and particularly, to that part of Lord Mansfield’s judgment in *Cooper v. Chitty*, wherein he speaks of men being excused from being punishable by indictment or action as trespassers. Mr. Justice Ashurst then adds, “ The
 “ Plaintiffs are not injured, as it is competent to
 “ them to recover the value of the goods by bringing the proper action of trover; but the officer
 “ shall not be harassed by this species of action, in
 “ which the jury might give vindictive damages.” It must be admitted, however, that if notice be material, this case is not any authority for the present; inasmuch as the fact of notice did exist in it.

Suppose, however, that all authorities are rejected, as if they were equal, or as if there had been no decision at all, the question then must have turned upon the construction of the statutes, and chiefly of the 13 Eliz. c. 7. s. 2: — whereby the Lord Chancellor is empowered to grant a commission; and the Commissioners are to take, by their discre-

* 1 T. R. 475.

1837.

GARLAND

v.

CARLISLE.

tion, such order and directions as well with the body of the offender, as also with his lands, &c., and with his money, goods, chattels, &c., and by deed, indented and inrolled in one of the Queen's Courts of record, to make sale of the lands of the bankrupt; and also of all furniture, &c., goods and chattels, or otherwise to order the same for the true satisfaction and payment of the creditors, rate and rate alike, according to the quantity of their debts: and it is further enacted, " That every direction, " order, bargain, sale, &c., shall be good and effectual in, the law to all intents and purposes, against " the said offender or debtor, &c., and against all " other persons claiming by, from, or under such " offender, by any act or acts had, made, or done, " after any such person shall become bankrupt as " is aforesaid." And, (by 21 Jac. 1. c. 19. s. 1.) it is enacted, " That all and singular the aforesaid " statutes and laws theretofore made against bankrupts, and for relief of creditors, shall be largely " and beneficially construed and expounded for the " aid and relief of the creditors of such person or " persons as already be or hereafter shall become " bankrupts."

These provisions are, certainly, of a sweeping nature, and were obviously intended so to be. They avoid all acts done after the bankruptcy, and they vest all the property in the assignees (since the statute 6 Anne, c. 22) by relation. " This " relation (says Lord Mansfield) the statutes concerning bankrupts introduce to avoid frauds. " They vest in the assignees all the property that " the bankrupt had at the time of what I may call " the crime committed (for the old statutes consider " him as a criminal) and make the sale by the

“ commissioners good against all persons who claim
 “ by, from, or under the bankrupt, after the act of
 “ bankruptcy, and against all executions, not
 “ seized and executed before the act of bankruptcy.
 “ Dispositions by process of law are put on the
 “ same foot with dispositions by the party.” The
 prevailing object was, to prevent and avoid those
 partial, and therefore unjust, dispositions of the
 remnant of their fortunes; which men in desperate
 circumstances (as we learn from the statutes) had
 been in the habit of making, and which we know
 men, in such a situation, are likely to make;—hence
 the relation to which I am alluding. The case of
Carey v. Crisp *, cited at the bar, for the purpose of
 showing that, till assignment, the property remains
 in the bankrupt, may well be admitted; for it is in
 no respect inconsistent. The question is, where the
 property is after the assignment—and from what
 date? and, upon that question, as no doubt exists,
 so none was attempted to be raised: the point was
 admitted. Consequently, as to the first requisite
 for maintaining the action of trover—I mean
 property in the goods—the case of the Defendant
 in error is abundantly established.

Next, as to the second requisite for supporting
 this action, — a conversion.

Suppose it had been the case of a stranger, — an
 indifferent person. The point, I apprehend, would
 have been clear;—and why? Because it would
 have been an unauthorised intermeddling with, or
 (in the language of the Court in the case of *Perkins*
v. Smith †, when defining a conversion) “ the taking
 “ upon him to dispose of the property of another;”

* 1 Salk. 108.

† 1 Wils, 328.

1837.

GARLAND
 v.
 CARLISLE.

1837.

GARLAND
v.
CARLISLE.

which is there declared to be “the tortuous act, the “gist of this action.”

The question, therefore, comes to this, Whether the case of the sheriff be excepted from, or rather not included in the operation of the statutes? or, if not, whether he be protected by the peculiarity of his situation and character?

That he is not expressly excepted is clear, and has, no where, been pretended. To hold that he is so, virtually, or constructively, is more than I am prepared to do. And, herein, I beg leave to say that I do most perfectly agree with the observations of more than one of my learned brothers, as to our duty in construing and interpreting acts of parliament. I take it to be this; where the words of the act are general and comprehensive, and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice, which must inevitably ensue from such a construction, can authorise courts of law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference, or varying by interpretation, but, to a certain extent, recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself? What right have we to assume, that, if the object in this case was (as it was undoubtedly) for the sake of preventing those frauds which have been before alluded to, to cut matters short at and from the act of bankruptcy, some inconveniences and hardships, consequent upon the general object and prevalent design, were not foreseen and known, but neglected for the sake of what was considered to be the greater good, — the

protection of the body of creditors? Supposing the sheriff to be, not excepted from, but included in the operation of the statute of Elizabeth, and that there may be some degree of hardship (if, in truth, that can be used as any argument at all) in such interpretation ; all that can be said is, that he shared the same fate with others, equally entitled to consideration, or, if the phrase be allowable, compassion. *Bonâ fide* payments were to be refunded ; harmless and honest dealings were avoided : against which inconveniences the Legislature, as your Lordships are aware, have, very properly and consistently, granted relief ; but an attempt to do the same by the courts of law would have been equally inconsistent and improper. In that relief, however, the sheriff is not included. Is he then, within the words of the statute of Elizabeth, “ a person “ claiming by, from, or under the offender ? ” It has been contended, that he is not ; and if, by that, it be meant to assert that he claims nothing for his own individual use and benefit, the observation is certainly not without truth ; but it falls short of the purpose for which it is made. The creditor who sets the sheriff in motion, clearly claims “ from ” the bankrupt ; the vendee, to whom the sheriff transfers the goods, claims “ from or under ” the bankrupt, or he gets nothing. Can I then say, that the sheriff who is so mixed up with the concerns of the bankrupt, in effectuating the claims of a party against him, and transferring the title to another from him, is to be considered, with reference to the statute, as if he stood wholly aloof from the transaction, — and, that too, when for the purposes of this action, and in order to constitute conversion in point of law, it is not necessary that any claim

1837.


GARLAND
v.
CARLISLE.

1837.

GARLAND

v.

CARLISLE.

should be made for the party's own emolument? This was the very point decided in the case, referred to already, of *Perkins v. Smith*; the special verdict there finding, that what was there done was by a servant, and, expressly, for the use of his master.

I come now to consider the situation of the sheriff, and how far that can, in any degree, affect the question. And surely this is not the first occasion, on which the responsibility of that officer has been heard of. That responsibility is the price which persons of figure and fortune are content to pay for distinction — one of those admirable arrangements in this country, by which men of possessions are made to contribute, in proportion to them, to the public good. I will not waste time, by enlarging upon instances: but what can be more responsible than his position with respect to bail? What more so with regard to the malversations of his subalterns, in cases even so much beyond, or out of the line of duty? This, undoubtedly, is not without compensation; and, practically, no difficulty is found in providing officers to act under him. But however that may be, the sheriff having acted with some peril of liability around him, in this instance, is no exception to or deviation from, but an illustration of, and in perfect conformity to, his usual course of duty. And how is it in cases more immediately in connection with the present, — the execution of writs? If he be directed to take the goods of A., and he take those of B., he is answerable for the mistake. The like, of course, if he takes a wrong person. In this instance he has been directed to take the goods of the bankrupt, and he has taken those of the assignee: — why should not liability follow?

But maxims of the common law, "That no relation shall make that tortuous, which was lawful;" and "That relations are fictions at law, which shall do no wrong," have been quoted with some reliance. How far general maxims or sayings are found to be of much value, when they come to be applied to any particular state of facts, I will not undertake to determine. If, however, they are to be considered in the nature of rules, which have grown up under the sanction and control of courts of law, it may be reasonable that the same authority, which created them, may also apply and bend them, as to right and justice may seem meet. But how they are to be applied to the construction of an act of parliament, I am quite at a loss to perceive. The question there only is, What has been enacted? I know of no rules of law or logic either, which can have any bearing upon the subject, except such as may be supposed to aid and assist in the true interpretation of the statute, and the ascertainment of its meaning. Its provisions may be, in policy, unwise—in theory, unjust; but when a court of law fully perceives and understands what is written, it is ready to give judgment,—its duty is complete. If it be (as any proposition can be) clear that the object of the Legislature was to pursue one main end and object,—the vesting property in a certain person or persons, from a by-gone period, by relation, overlooking, or disregarding as comparatively immaterial, certain incidental inconveniences consequent upon that relation, of which, for the purposes of the present observations, the liability of the sheriff may be admitted to be one, an attempt to show that such liability ought not to exist, either by the aid of maxims of law, or any

1837.


GARLAND
v.
CARLISLE

1837.

GARLAND
v.
CARLISLE.

other process of reasoning, is quite beside the legitimate purpose of ascertaining the intention of the Legislature. It is argument not to explain what has been done, but to prove what *ought* to have been done, — what *would* have been reasonable and what just; or, in other words, argument out of time, and out of place.

Upon the whole, upon the weight of authority, and the reason of the thing, if the question had been entirely new, I consider myself bound to give my answer in the affirmative.

Gurney B. — The first question upon which your Lordships have required the opinion of the Judges, is, Whether a sheriff seizing and selling goods under a *fiery facias*, was, in December 1824, liable in an action of trover, brought by the assignees of the Defendant, in the action in which the *fiery facias* was issued, such Defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after such sale?

The opinion which I have formed is in favour of the affirmative.

This question depends upon the construction of the statute of 13th Eliz. cap. 7., which empowers the Lord Chancellor, by commission under the Great Seal, “to appoint persons who shall have full
“ power and authority to take such order and di-
“ rection with the body of the bankrupt, as also
“ with his land, and also with his money, goods,
“ chattels, wares, and merchandises, and debts
“ wheresoever they may be found or known, and
“ cause them to be appraised to the best value they
“ may, and to make sale of the same, or otherwise
“ to order the same for true satisfaction and pay-
“ ment of the creditors.”

This is a plain, clear, distinct enactment.

The first question is, What is the property of the bankrupt respecting which the Commissioners are to take order? The answer, it appears to me, must be, the property which the bankrupt had at the time he became so. The fact of his being bankrupt is not publicly known at the time when it takes place — it is ascertained at a subsequent period: a commission issues, adjudication is made, assignees are appointed; to them the bankrupt's property is assigned, and their title to the bankrupt's property relates back to the time of the act of bankruptcy.

It is, indeed, stated in the special verdict, that these were the goods of Leonard; but, by the subsequent commission of bankrupt and assignment, became the property of the Plaintiff by relation, from the act of bankruptcy.

This relation back is absolutely necessary for the prevention of fraud.

Unquestionably this often produces great hardship to individuals — if that were not known when the statute passed, it has become known in a thousand instances since; and in particular cases the application of the rule has been restrained, not by the courts of law, but by the Legislature. Where exceptions have not been introduced, the rule has been considered as inflexible.

If the assignees have therefore a title to the property of the bankrupt, it appears to me to be a necessary consequence, that they must be entitled to follow that property whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors.

In this case, at a period when the fact of the bank-

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND

v.

CARLISLE.

ruptcy was not known (although it had taken place), the Defendant, the sheriff, who was commanded to take the goods of Leonard the bankrupt, took goods which *had* belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee ; and he converted them.

The Defendant contends, that he is not liable to this action of trover, because he is a public officer ; that he was called upon to execute the process of the law ; and that at the time when he executed it, he had no reason to doubt that the goods which he found in the possession of Leonard were his property. I admit the hardship, and regret that it exists ; but the Legislature has not made any exception in favour of a public officer, under these circumstances ; and I think that a court of law cannot supply that omission.

This is the best opinion I can form upon the act of parliament itself ; and this would be my judgment were the case *res integra*.

The next question is, Whether this act of parliament has in all times received a contrary exposition ? If an act of parliament more than two centuries old, has received one uniform construction, it would, perhaps, be more safe to yield to that construction (even though it should not be quite satisfactory) than, by making a change, to unsettle the opinions and the practice of the profession and of the public.

But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary, I find the cases and the practice for a period of nearly eighty years, in favour of

the construction which I have given: and the older cases, upon which reliance is placed for the opposite construction, appear to me to have been of doubtful authority.

The first case which is relied upon in favor of the Plaintiff in error is *Baily v. Bunning*.*

This case is very imperfectly and confusedly reported.

It was an action of trover; yet, if we can trust the reports, the discussion that took place would rather have induced the supposition that it had been considered to be an action of trespass. The finding of the jury, indeed, appears to have proceeded upon that supposition, for they submit the question to the Court upon the taking by the Defendant; which would have been the question if the action had been trespass, but certainly was not the question when the action was trover.

It appears, too, upon an examination of the Postea, that although the jury found the demand and refusal (which are evidence of conversion) they did not find the conversion, and the goods remained in the hands of the sheriff.

Considering the actual finding of the jury, the discussion that took place, and the imperfect reports with which we are furnished, I cannot but think that much more importance has been ascribed to this case than it deserves.

The next case is, *Letchmore v. Thorowgood*†, and which came on again as reported in 1 Shower, 12.

This was an action of trespass, and all that the

* This is reported. 1 Levinz, 173. 1 Siderfin, 271.
2 Keble, 32, 33.

† 3 Mod. 236.

1837.

GARLAND

v.

CARLISLE.

Court was called on to decide was, whether trespass would lie, — and they held that it would not.

I agree entirely with the decision in that case, that trespass would not lie. The bankrupt could not bring the action, for his property in the goods had ceased. The assignee could not bring the action, because possession, real or constructive, is necessary to sustain an action of trespass; and he had neither.

His property related back, because the statute had given it to him; but the statute had not given a relation of possession.

An action of trover was afterwards brought, and the Plaintiff again failed; and Shower, in his report, says it was decided, that having brought trespass and been defeated, trover could not now be sustained.

The Court did not decide that trover could not have been maintained if that had been brought first. Whether the Court decided rightly, that the judgment for the Defendant in the trespass was a bar to the action of trover, it is not necessary to inquire.

The next case is *Cole v. Davies**, which at best is but a Nisi Prius case.

Lord Mansfield, in the case of *Cooper v. Chitty*, suggests a doubt of the correctness of the note; and if Lord Raymond, in taking his note, omitted but two words, the law laid down will be unquestionable.

If Lord Holt said, not that no action will lie, but no action of trespass will lie against the sheriff because he obeyed the writ, then this case will not

* Lord Raymond, 724.

be inconsistent with what I conceive to be the law.

These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt, under a warrant to levy on the goods of the bankrupt.

The last of these cases occurred in the year 1698; and there does not appear to be any thing to fill up the chasm between that case and the case of *Cooper v. Chitty*, which was decided in the year 1756.

The case of *Cooper v. Chitty* was twice argued, and Lord Mansfield, assisted by Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot, delivered an elaborate judgment upon it.

It is reported by Burrow, Blackstone, and Lord Kenyon; and I think the report by Lord Kenyon is the most distinct and satisfactory.

There is no doubt that the facts of this case of *Cooper v. Chitty*, differ from the facts in the case before your Lordship, inasmuch as the conversion was after the bankruptcy; but the value and the importance of the case consists in this, that the whole doctrine upon the subject of bankruptcy being amply discussed, Lord Mansfield illustrated with great perspicuity the distinction between trover and trespass,—a misapprehension respecting which had before existed; and the Court decided that the sheriff would not be liable to an action of trespass, but that he was liable to an action of trover, where the act of bankruptcy over-reached the execution.

The case is further valuable for this reason, that the preceding cases of *Bayly v. Bunning*, *Letchmore v. Thorowgood*, and *Cole v. Davies*, were brought under the consideration of the Court; and

1837.

GARLAND

v.

CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

so far as either of them can be considered as militating against the doctrine then laid down by the Court, they were over-ruled.

I think that the reasoning of Lord Mansfield is sound and convincing — that he has made the true distinction between trover and trespass; and it is certain that that solemn decision received the universal assent of Westminster Hall. It appears from the declaration of Mr. Justice Burrough, in the case of *Lazarus v. Waithman*, that when he entered into the profession he found it settled and established law.

That is confirmed by the case which occurred next after the case of *Cooper v. Chitty*, in 1772; the case of *Hitchin v. Campbell*, reported in 2 Blackstone, 779 and 827, and 3 Wilson, 304.

It appears that in that case the assignees had first brought an action of trover against the sheriff for a conversion of the bankrupt's goods, in which they had failed; and they afterwards brought an action against the sheriff for money had and received, that money being the produce of the goods sold under the execution; and the Court decided that, inasmuch as the Plaintiff had had judgment against him in the action of trover, he could not after that maintain an action for money had and received.

In the report in Wilson, it is stated, that at the trial of the present action, it was proved that Anderson committed an act of bankruptcy before the 9th of March, to wit, in February. This was necessary to over-reach the execution. From this, I think, that the inference is, that in the action of trover that proof was not given; from what followed, it could not have been on account of the

Judge being of opinion that the action could not be maintained; for occasion is taken by Lord Chief Justice De Grey — an able, learned, and accurate lawyer — to declare the law to be that which had been laid down by the Court of King's Bench, in the case of *Cooper v. Chitty*.

The report in Blackstone is this, —

“ The legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners by relation to divest the property of the bankrupt from that time, in case a commission be afterwards issued: this relation takes place in every instance, but three excepted, by statutes 1 Jac. 1., 21 Jac. 1., and 19 Geo. 2. Executions are not among these excepted cases, but are expressly declared void by the statute 21 Jac. 1., the commission being in the nature of an execution for the whole body of the creditors.”

By the old acts of Henry 8th and Elizabeth, commissioners had a power of acting themselves in recovering the bankrupt's effects: afterwards it became the practice to assign, which is allowed by 1 Jac. 1. c. 15.; it was not till the 5th of Anne that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued: so ruled in *Letchmore v. Thorowgood*, in *Comb.* and *Shower*, and in *Cooper v. Chitty* *: but by selling, the sheriff converts the goods, and then trover is maintainable against the

* 1 Burr 20.

1837.


 GARLAND
 v.
 CARLISLE.

sheriff or his vendee, or the Plaintiff in the original action.

This case occurred sixteen years after the decision in *Cooper v. Chitty*; and Chief Justice De Grey and the Court of Common Pleas adopt the principle laid down by the Court of King's Bench in *Cooper v. Chitty*, distinguishing the case of trespass from that of trover.

The next case in order of time is, the case of *Smith v. Milles*.* At the time that case was argued and decided there were but two judges sitting in the Court, but they were judges of great authority, — Mr. Justice Ashurst, and Mr. Justice Buller.

That was an action of trespass against the sheriff; the act of bankruptcy was on the 1st of February, and the commission on the 27th, the adjudication of bankruptcy on the 28th.

The seizure by the sheriff was upon the 23d

The goods were sold in the middle of the month of March.

The Court was of opinion, that the action of trespass did not lie; but it declared its entire concurrence in the opinion of the judges in *Cooper v. Chitty*, that trover might have been maintained.

Mr. Justice Ashurst makes a long citation from the judgment of Lord Mansfield to establish both positions, and then concludes :

“ The Plaintiffs (the Assignees), therefore, are
 “ not injured, as it is competent to them to recover
 “ the value of the goods by bringing a proper ac-
 “ tion, namely, an action of trover; but the officer
 “ should not be harassed by this species of action,

* 1 Term Rep., 475., in 1786.

“ in which the jury might give vindictive damages.”

The next case is *Potter v. Starkie*. 1807.* The Court of Exchequer held the sheriff liable in trover, though he had seized, sold, and paid over the money before commission issued, and before any notice, saying this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods.

There is a case which has not been cited in the course of the argument; it is true it is only a *Nisi Prius* case, but I mention it as one of the very many that have occurred, where the law has been treated as settled. *Wilson v. Milner*.†

An action for money paid, and money had and received.

“ On the 20th of February, 1809, the Defendant
 “ sued out a *fi. fa.* into Middlesex, upon a judgment against one J. George; and the warrant
 “ to levy 155*l.* besides poundage, was directed to
 “ the Plaintiff, a bound bailiff of the sheriff of
 “ Middlesex; the Plaintiff made his levy, and on
 “ the 22d of February paid over the 155*l.* to the
 “ Defendant.

“ On the 1st of March, a commission of bankrupt
 “ was sued out against George, and it was found
 “ that he had committed an act of bankruptcy on
 “ the 19th of February. His assignees immediately brought an action of trover against the
 “ sheriff, and both the parties to the present suit,
 “ and recovered 152*l.* 18*s.* 6*d.* damages, together
 “ with costs, making up the sum of 216*l.*; the whole
 “ of which was paid by the bailiff to the assignees.

“ It was contended on the one hand, that the

* Cited in 4 Maule & Selw. 260.

† 2 Campb. 452.

1837.

GARLAND
 v.
 CARLISLE

1837.
 GARLAND 
 v.
 CARLISLE.

“ Plaintiff was entitled to be completely indem-
 “ nified by the Defendant; and on the other, that
 “ an action could not be maintained by the bailiff
 “ to recover back even the 155*l.*, which as it could
 “ not be retained by the Defendant was money
 “ had and received to the use of the sheriff.

Lord Ellenborough. — “ I think the Plaintiff
 “ cannot recover on the count for money paid.
 “ Among joint tort-feazors there is neither contri-
 “ bution, nor implied promise of indemnity. But
 “ the 155*l.* being paid to the Defendant, under a
 “ mistake respecting George’s bankruptcy, I think
 “ it may be recovered as money had and received
 “ to the use of the Plaintiff, who was answerable
 “ for it to the assignee.”

The next case in order is *Lazarus v. Waithman*. *

In this case the goods were seized and sold by the sheriff after an act of bankruptcy, but before the commission; and it was decided that trover was maintainable against the sheriff.

The case of *Bayly v. Bunning*, and the subsequent cases, were fully gone into; and the Court adopted the judgment of the Court of King’s Bench, in *Cooper v. Chitty*, and *Smith v. Milles*, distinguishing actions of trover from actions of trespass.

The next case is *Price v. Helyar*. †

In this case the subject was very thoroughly discussed; and the Lord Chief Justice (now a member of your Lordships’ house) pronounced the judgment of the Court, affirming the doctrine of *Cooper v. Chitty*, and the subsequent cases — adhering firmly to the distinction between actions of trover and actions of trespass. The only remaining case

* 5 B. Moore, 312.

† 4 Bing. 597.

is *Dillon v. Langley**, K. B. It was decided three days after judgment in this case had been given by the Court of Common Pleas, and in conformity with it.

The cases which I have cited have the authority of nearly twenty judges, who have sat in Westminster Hall, who are not now living, and several who are now present. These cases appear to me to prove to demonstration what has been considered to be the law from the time of the case of *Cooper v. Chitty* until the case of *Balme v. Hutton*; and the judgment of the Court of Exchequer in that case was reversed in the Exchequer Chamber.

Besides the cases which have been reported, numerous cases have occurred at Nisi Prius, in which this doctrine has been held and acted upon, and no motions made for new trials on the ground of misdirection, because this has been the general opinion of the profession.

Against all this we have nothing but the plea of hardship.

It is undoubtedly true, that it is a hardship upon the sheriff, that he should be liable to an action of any kind when he has acted in ignorance and *bonâ fide*.

But it is part of the infirmity of human legislation, that the general rule which it prescribes will work hardship in particular cases; and it is for the Legislature to afford such relaxation of the rule as can be done with safety. This has been done from time to time with regard to this rule of relation, but the Legislature has not relaxed it so far as to give relief to the sheriff in this case.

The sheriff is exposed to other risks where he

* 2 Barnw. & Adol. 131.

1837.

GARLAND

v.

CARLISLE.

acts equally *bonâ fide*. The office is an office of risk and liability; but the sheriff receives ample remuneration for his risk as well as his trouble, and he cannot take the remuneration and shake off the liability.

If he thinks that the risk is disproportioned to the remuneration, let him apply to the Legislature for relief; his risks have been materially lessened by the Legislature, his profits have not been abridged.

There is not any case of hardship upon the sheriff under the Bankrupt Law which can be compared with the case of *Glasspoole v. Young**, which was an action of trover against the sheriff.

The Plaintiff, then a widow, had intermarried with one Mearing. The goods in question at the time of her marriage were her property. In the course of the next year a judgment, on a Warrant of Attorney, was entered up against Mearing, and a writ of *fi. fa.* issued, under which the sheriff seized the goods in the house where Mearing and the Plaintiff lived together as man and wife.

The Plaintiff believed herself to be his wife; an application was made to set aside the execution, for some supposed irregularity in which she made an affidavit as his wife. Two years afterwards she discovered that he had a former wife living. She brought an action of trover against the sheriff, and recovered the value of the goods which he had taken.

There was in that case every ingredient that could constitute a case of *bona fides* in the sheriff, and of hardship in his being thus called upon long afterwards to pay the value of the goods which he

* 9 Barnw. & Cress. 696.

had seized and sold ; but the law was inflexible. Under a warrant to take the goods of Mearing, the sheriff had taken the goods of Glasspoole ; and the Court of King's Bench held that he was liable.

This case was cited in the Court below, merely for the purpose of showing the inflexibility of the rule of law, and that it was a case of even greater hardship upon the sheriff than the case at bar.

The learned counsel has pointed out that it does not entirely resemble this case, for that the fact of want of ownership in the Defendant existed at the time, although it was not known to the sheriff ; but a sheriff is not much benefitted by the existence of a fact which he is unable to discover ; and if he had refused to levy on these goods the judgment creditor might have attached him, because the Defendant had possession of the goods as owner, and no one but himself knew that he was not.

I do not know that the hardship upon an officer, who is well paid for his risk, is greater than that of many other persons upon whom the operation of the Bankrupt Laws is found to press, and upon whom they formerly pressed still more heavily.

The preambles to the early statutes show the unceasing jealousy of the Legislature as to the frauds of bankrupts ; and one after the other recites the difficulty of keeping pace with the secret frauds and contrivances which were resorted to to defeat their creditors.

Possibly it was owing to that, that the relation back of the title of the Assignees was long allowed to prevail to an extent which worked great injustice : nevertheless, the courts of law contented themselves with expounding the law as they found

1837.

GARLAND

vs

CARLISLE.

1837.
GARLAND
v.
CARLISLE.

it; and the repeated amendments which the law has received, it has received from the Legislature.

The statutes of the 1 Jac. 1. c. 15., 21 Jac. 1. c. 19., 19 Geo. 2. c. 32., 46 Geo. 3. c. 65. have all been passed to relieve persons from the hardship occasioned by the application of this principle, the relation back of the property of the assignee, and during the pendency of this cause the Interpleader Act has extended the protection which before was given to the sheriff.

Having answered that question in the affirmative, the second question which your Lordships have proposed is, Whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the Plaintiff and the Defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage?

This question I answer also in the affirmative. The sheriff having seized the goods, he is to proceed to a sale, unless he becomes satisfied that the goods are not the property of the Defendant in the cause; and then it is his duty to abandon: if he abandons, he does not receive any poundage.

Permitting the goods to be disposed of according to an arrangement between the Plaintiff and the Defendant, without proceeding to a sale, I consider a conversion.

The goods were in his possession: permitting them to be disposed of appears to me to be the same thing as disposing of them himself. He cannot be permitted to say that he has not made an effectual levy, for he has received the legal remuneration for an effectual levy—for an effectual levy to the whole amount of the debt.

The case of *Thomson v. Clerk* *, decided that the sheriff, upon the writ of *fiery facias*, cannot deliver the Defendant's goods to the Plaintiff in satisfaction of his debt.

It is no part of the duty of the sheriff to step in upon the requisition of the Plaintiff with a writ as the instrument to hand over the goods to him.

His duty is clear; he is to sell, or to withdraw; if he withdraws, not having disposed of the goods or concurred in any arrangement for their disposal, he will not be liable to an action of trover, because he will not have been guilty of conversion; but if he does either the one or the other, I humbly conceive that he is liable.

Mr. J. Patterson. — The first question proposed by your Lordships being limited in point of time to the month of December, 1824, which was long before the statute 6 Geo. 4. c. 16. came into operation, the answer must depend upon the construction which ought to be put upon the previous statutes as to bankrupts, particularly 13 Eliz. c. 7. The second section of that statute authorises the Commissioners to make sale of the bankrupt's goods wheresoever they may be found or known; and enacts, that what they shall do shall be good and effectual in the law to all intents and purposes against the said offenders or debtors, “and against
“all other person or persons claiming by, from, or
“under such offender or offenders, debtor or
“debtors, by any act or acts had made or done after
“any such person shall become bankrupt as is
“aforesaid.”

The previous statute, 34 & 35 H. 8. c. 4., did

* Cro. Eliz. 504.

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND

v.

CARLISLE.

not contain any words so strong as these ; and the subsequent statutes passed in the reign of James the First, in general refer to the statute of Elizabeth.

But the ninth section of 21 Jac. 1. c. 19. provides “ That all and every creditor and creditors
“ having security for his or their several debts by
“ judgment, statute, recognisance, specialty, with
“ or without penalty, or having attached goods of
“ the bankrupt, whereof there is no execution or
“ extent served and executed upon any the lands,
“ tenements, hereditaments, goods, and chattels,
“ and other estate of such bankrupt, before such
“ time as he or she shall or do become bankrupt,
“ shall not be relieved upon any such judgment,
“ &c. for any more than a rateable part of their
“ just and due debts with the other creditors of
“ the said bankrupt, without respect to any such
“ penalty, or greater sum contained in any such
“ judgment.” This section appears to me not to affect the present question, but to have been framed with a view to do away with any distinction between debts of different denominations or degrees, and to put all creditors on an equal footing, whether they have security or not. It, however, provides that judgment creditors shall have no preference; and it follows that any execution levied after an act of bankruptcy cannot be sustained, and that any goods seised under such an execution must be dealt with by the commissioners under the 13 Eliz. c. 7. s. 2.; and so it may be considered to be a legislative exposition of that statute, as applying to executions, as well as all other dispositions of a bankrupt’s property.

The object of both statutes appears to have been to avoid every act affecting the bankrupt’s

property after he has committed an act of bankruptcy, in order to ensure an equal division among his creditors; and such has always been the effect given to them by courts of law. In 1 Ves. 328, *Billon v. Hyde*, Lord Hardwicke says, “ By the Act of Bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them: so that a sale of goods by the bankrupt after the act committed is a sale of their property; and for which they may maintain trover. So it is, as to the payment of money; and this was the intent of the act of parliament, the statute of James the First, c. 19. s. 14. being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed without knowing it. The relation the assignment has, does not only overcharge acts done in pais, and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record and legal acts done by him, such as judgments: so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said that the rule, founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the injury of any one; which is a general rule invented to support the right and equity of the case. But the reason for taking this case out of that rule is plain, and the law did intend it, on this general rule, that it is

1837.


GARLAND
v.
CARLISLE

1837.

GARLAND

v.

CARLISLE.

“ better to suffer a particular mischief than an in-
 “ convenience ; and the Legislature foresaw there
 “ would be a particular mischief, which they cured
 “ by that proviso, but did not extend it further,
 “ because the inconvenience on the other hand, of
 “ suffering bankrupts to dispose of their effects by
 “ contracts or judgments, would put it in their
 “ power to defeat their just creditors of their debts :
 “ so, as it would be difficult commonly to find out,
 “ whether there was a mixture of fraud, the Legis-
 “ lature thought it better to lay down that general
 “ rule.”

Lord Hardwicke here treats the relation to the Act of Bankruptcy as a positive enactment by statute, not as a mere fiction of law ; perhaps his language in so treating it is not quite consistent with that which is attributed to him in *Brassey v. Dawson**, but I apprehend that it is the true view of the subject ; and as such has been generally adopted by the Courts, and indeed by the Legislature. The subsequent statutes, which exempt from this relation certain specified cases, recognise and confirm its general operation — as for instance, 19 Geo. 2. c. 32., as to payments in the ordinary course of trade — 46 Geo. 3. c. 65., as to conveyances, contracts, and other dealings and transactions *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission ; and more particularly 49 Geo. 3. c. 121. s. 2., as to executions *bonâ fide* made and levied more than two calendar months before the date and issuing of the commission. This last statute is the most important to the present question, because it seems to me to be an exposition of

* 2 Str. 978.

the meaning of the second section of the statute of Elizabeth, and the 9th section of the statute of James, and to furnish a satisfactory answer to the argument raised at the bar, viz. that the sheriff does not claim “by, from, or under, such offender “or debtor.” It is plain that, by the 49 Geo. 3., if an execution be *bonâ fide* executed less than two calendar months before the commission, although in ignorance of the bankruptcy, it is not good. Why is it not? Because it is avoided by the statutes of Elizabeth and James, and the property is in the assignees by relation, under the statute of Elizabeth; which it would not be unless the persons putting it in force were considered to claim “by, from, or “under,” the bankrupt. The truth is, that those who enforce an execution—and the sheriff amongst them—do claim “by, from, and under,” the debtor within the meaning of that statute; they claim to take the goods because they are the property of the debtor: it is only on that ground that they can claim them at all. They do not pretend to have any property in them themselves, but only to take them, as being the goods of the debtor, in order to convert them into money for the satisfaction of his debt. They claim indeed against the will, and without the consent of the debtor; but not the less “by, “from, and under,” him; and the clause in the statute of Elizabeth was so framed in order to exclude from its operation persons claiming the goods as their own, asserting property in them, and denying them to be the goods of the debtor.

Accordingly, it has hitherto been uniformly held, that the execution creditor is liable to the assignees in trover, if he takes part in the sale, or receives the proceeds, wherever there has been a prior act

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND
v.
CARLISLE.

of bankruptcy, unless the case be within the exemption in 49 Geo. 3. Not even a *dictum* is to be found to the contrary, and it is admitted in the fullest terms in the judgment of the Court of Exchequer, in *Balme v. Hutton*.^{*} It is also held that a vendee of the goods at a public sale by the sheriff is liable to the assignees in trover, under the same circumstances, and for the same reason, viz. that the goods were at the time of sale the property of the assignees, although no commission had then issued; *Farrant v. Thompson*.[†] Yet if the goods are the property of the debtor, the vendee under the sheriff is not liable to an action, although the judgment or execution under which they are seized be set aside for irregularity, *Doe v. Thorn*[‡]; or reversed on error, *Buckhurst v. Mayo*.[§]

If then the creditor who puts the sheriff in motion, and the vendee who takes by sale from him, being wholly ignorant of any act of bankruptcy, are nevertheless liable in trover, in consequence of the relation enacted by the statute of Elizabeth, in order to give full effect to the bankrupt laws, what ground is there for exempting the sheriff from a similar liability? No provision to that effect is to be found in any of the statutes. If there be any such exemption, it must arise impliedly from the nature of his office and the circumstances under which he is called upon to act. Now his office is one of some profit, and of considerable risk in the taking of bail, in the execution of writs, independent of questions under the bankrupt laws, and in many other respects, to which he is exposed for the sake of the community by the common law and

^{*} 2 Cr. & Jerv. 19. [†] 5 B. & A. 826.; S. C. 2 Dowl. & Ry. 1.

[‡] 1 M. & S. 425.

[§] Vin. Abr. Error, I. b. pl. 3 and 4.

by legislative provisions ; instances of such risks are noticed in several of the judgments in the case of *Balme v. Hutton**, and in the present case of *Carlisle v. Garland*†, to which I would beg to refer your Lordships, rather than repeat them tediously.

The circumstances under which he is called upon to act are often difficult in cases such as are referred to in the first question proposed by your Lordships. He is commanded by the writ to seize the goods of A., and he seizes goods in the possession of A., supposing them to be his property, and having no reason to doubt it. It turns out that A. had only a defeasible property in the goods ; that, by reason of subsequent events, they were by relation the goods of other persons from a time antecedent to the seizure ; so that the sheriff, without any fault on his part, has not obeyed the writ ; yet if he had refused to seize the goods, and no commission had subsequently issued, he would have been answerable in another way to the execution creditor for such refusal. This appears to be very hard ; but I cannot admit that hardship is in any case in itself a sound ground for a legal decision : the utmost effect that it can properly have, as it seems to me, is to induce a doubt, and to make the mind pause before it acquiesces in a rule from which such a consequence will follow. If the argument of hardship could prevail, it surely ought to extend to the vendee, who has paid once for the goods, and has no remedy except by proof under the bankrupt's commission ; whereas the sheriff has his action against the execution creditor for money had and received. *Wilson v. Milner*‡, *Austin v. Ward*.§

* 1 Cr. & Mees. 272.

‡ 2 Campb. 452.

† 2 Ibid. 31.

§ 1 Car. & P. 370. and 507.

1837.
GARLAND
v.
CARLISLE.

The apparent hardship has therefore made me doubt and examine the statutes of bankrupt to see whether I could find any thing in them pointing at any distinction between the sheriff and any other person concerned in putting an execution in force against the goods of a bankrupt. I have been unable to discover any thing of the sort ; and when I recollect that the Legislature has from time to time given relief in other cases of apparent hardship under the bankrupt laws, and more particularly in the year 1809, when the doctrine of the sheriff's liability in such cases was uniformly acted upon, has given relief with respect to executions more than two months before the commission, but has not then made any distinction as to the sheriff ; I cannot but think that no such distinction was intended ; and that, construing the statutes in their plain meaning, I am bound to say, that the property is in the assignees by relation, from the time of the act of bankruptcy, against all persons but the Crown ; and that it follows of necessity that all persons who intermeddle with that property, not being within the exceptions of any of the statutes, are answerable for so doing.

Thus far I have stated my opinion upon the construction of the statutes, independent of the authorities upon this particular question. Those authorities have been cited, and commented upon so fully, in the cases of *Balme v. Hutton* and *Garland v. Carlisle*, that I do not feel myself justified in occupying your Lordships' time by again going through them. I admit that the case of *Cooper v. Chitty* * is not a direct authority upon the point. But since that case there are many

* 1 Burr. 20.

authorities, which I need not cite, directly in point, that the sheriff is liable in trover, though not in trespass; a distinction for which, I think, I see good reason; but it is not necessary to discuss that point, since your Lordships' question is confined to the action of trover. Opposed to these are some older cases; *Cole v. Davies* *, which is, at best but a *nisi prius* case, loosely reported; *Bayly v. Bunning* †, of which case, speaking with all deference, I must say, as I have said before, that the reports of it are so confused and contradictory, that I am really unable to discover what the Court ultimately did decide, or upon what ground they decided. *Letchmore v. Thorowgood* ‡ and *Letchmore v. Toplady* § decided only, first, that *trespass* would not lie, and, secondly, that the judgment in an action of trespass was a bar to an action of trover; neither of which decisions are in point to the present question. I by no means agree that the modern decisions have proceeded, as has been supposed, on a mistaken notion with regard to the case of *Cooper v. Chitty*, for I find that, in many of them, the older cases, and that of *Bayly v. Bunning* in particular, were cited. The preponderance therefore of authority, as to decided cases, is greatly in favour of the liability of the sheriff, and the established practice was such that the law was considered as fully settled. Still, if I was satisfied that it had been so settled upon any erroneous principle, I should be bound to say so, and to point out what I considered to be the error, in answering the question put by your Lordships; although, in

1837.

 GARLAND
 v.
 CARLISLE

* 1 Lord Raym. 724.

† 1 Lev. 173.; 1 Sid. 271.; 2 Keb. 32.

‡ 3 Mod. 236.; 1 Show. 12.; Comb. 123.

§ 1 Show. 146.; 2 Vent. 169.

1837.

GARLAND
v.
CARLISLE.

the Courts below I might not feel myself at liberty so to do. But for the reasons already given I think that the modern decisions are correct. The cases of *Rickett v. Downe* * and *Foster v. Allanson* † were pressed at the bar ; in which it was held, that the fact of an act of bankruptcy having been committed by Plaintiff, was no answer to an action brought by him ; and the reason given was, that if the Plaintiff should recover, and the Defendant pay, under process of law, the assignees under a subsequent commission could not sue him for the same debt. How far those decisions are consistent with the provisions of the statutes of Elizabeth and James may, perhaps, be doubted ; they can, at all events, apply only to cases arising on similar facts, and do not, as it seems to me, authorise the introduction of another exception to the retrospective operation of the bankrupt laws. In answer, therefore, to your Lordships' first question, I am of opinion that the sheriff, under the circumstances therein stated, is liable to an action of trover brought by the assignees.

In answer to your Lordships' second question, I am of opinion that the sheriff having seized goods under the circumstances mentioned in the first question, and having permitted them to be disposed of, according to an arrangement between the Plaintiff and the Defendant, the action without proceeding to a sale, but under which the sheriff received his poundage, is liable in the same manner as if he had himself sold them.

I consider the sheriff to have seized under a writ of *feri facias* against the bankrupt's goods, which

* 3 Campb. 130.

† 2 Term Rep. 479.

turn out to be the property of the assignees : he has permitted two persons to dispose of these goods, neither of whom had the absolute property in them. The Plaintiff in the action had no property whatever in them ; the Defendant had but a defeasible property ; and the sheriff, by his acts of permission and receipt of poundage, has made himself a party to the disposition of the goods of the assignees, without their authority or consent, which I have no doubt makes him liable to an action of trover.

With respect to the third question proposed by your Lordships, I presume that I ought not to offer any opinion, as I have answered the first question in the affirmative.

Alderson B.—I do not apprehend, after the very full and elaborate discussion which this case has undergone, that I should usefully occupy your Lordships' time by commenting at length on the various cases and statutes referred to in the course of this argument.

I propose, therefore, to state shortly to your Lordships the points which I consider to have been established, and the grounds on which my opinion must depend.

In the first place, I consider it as made out that upon the assignment by the commissioners, all the bankrupt's property vests in the assignees by relation from the act of bankruptcy ; and that this being a relation created by the Legislature, is equivalent to a statutable enactment ; that at the time of, and by the commission of, an act of bankruptcy, that property which before was the property of the bankrupt, becomes the property of others his assignees.

I am content, for this purpose, to refer your Lordships to the reasons contained in the judgment

1837.

GARLAND

v.

CARLISLE.

1837.


 GARLAND
 v.
 CARLISLE

of Mr. Baron Parke, in this case, which is to be found in 3 Tyrw. p. 746.

I entirely concur, also, with that learned judge in thinking that the sheriff, who undoubtedly claims to take the goods under the execution, only because they are the goods of the bankrupt, is a person who claims by or under the bankrupt. And where the proceedings are subsequent to the act of bankruptcy, that he claims “by or under the bankrupt, “by an act done after the bankruptcy.”

For if we were to confine those words to voluntary acts done by the bankrupt himself, we should, in the first place, violate their most simple and plain meaning; and secondly, the more limited construction thus adopted would equally enable the execution creditor to hold the goods, which would be contrary to the policy of the law; and thirdly, it would equally exonerate the sheriff if he acted after he had notice of the act of bankruptcy, and even of the commission itself. In addition to these reasons, I may also rely on the authority of Lord Mansfield, in *Cooper v. Chitty*, where he says dispositions by process of law are put on the same principle with dispositions by the party; to be valid, they must be completed before the act of bankruptcy: and of Lord Hardwicke, in *Billon v. Hyde**, where he says,—

“By the act of bankruptcy all the real and per-
 “sonal estate vested in the assignees, and the pro-
 “perty vested in them from the time of the act
 “committed—and that may go back to a great
 “length of time, and it overcharges all those acts
 “without regard to the fairness or fraud in them;
 “so that a sale of goods by the bankrupt after the
 “act committed is a sale of their property; for

* 1 Ves. sen. 328.



“ which they may maintain trover. So it is as to
“ the payment of money ; and this was the intent
“ of the act of parliament, the statute of Jac. 1.
“ c. 19. s. 14. being, that this shall not extend to
“ the prejudice of any debtor of the bankrupt who
“ paid his debt after the act committed, without
“ knowing of it. This relation the assignment has :
“ it does not only overcharge acts done in *pais* and
“ contracts entered into by such persons having
“ committed an act of bankruptcy, but also acts
“ on record, and legal acts done by him, such as
“ judgments ; so that if execution is taken out
“ after the act committed upon a judgment before,
“ that execution is undone and set aside. It is
“ said, that this rule, founded on this act of par-
“ liament, is contrary to the general reason of the
“ law, which says, that fictions of law and legal
“ relations shall not enure to the wrong of any
“ one ; which is a general rule invented to support
“ the right and equity of the case. But the reason
“ of taking this case out of that rule is plainly this
“ — and the law did intend it on this general rule—
“ that it is better to suffer a particular mischief
“ than an inconvenience ; and the legislature fore-
“ saw there would be a particular mischief which
“ they cured by that proviso ; but did not extend
“ it farther, because the inconvenience, on the
“ other hand, of suffering bankrupts to dispose of
“ their effects by contracts or judgments, would
“ put it in their power to defeat their just creditors
“ of their debts, so as it would be difficult com-
“ monly to find out whether there was a mixture of
“ fraud ;—the Legislature thought it better to lay
“ down that general rule.” And again, Lord
Mansfield, in *Cooper and Another v. Chitty*, ex-

1837.

—
GARLAND
v.
CARLISLE.

1837.
 GARLAND
 v.
 CARLISLE.

presses himself in these words :—“ This relation
 “ the statutes concerning bankrupts introduced to
 “ avoid frauds. They vest in the assignees all the
 “ property that the bankrupt had at the time of
 “ what I may call the crime committed (for the
 “ old statutes consider him as a criminal); they
 “ make the sale by the commissioners good against
 “ all persons who claim by, from, or under, the
 “ bankrupt after the act of bankruptcy, and against
 “ all executions not served and executed before
 “ the act of bankruptcy.”

Now if this be the result of a due construction of the various statutes applicable to bankrupts, and there be no express exception in those acts of parliament in favour of the sheriff (which I take to be a conceded point), what reason is there why the Court should make an implied exception in order to avoid what is supposed to be a great hardship on this public officer. I conceive this is a question for legislative interference, and not for judicial interpretation.

If the legislature have enacted, for certain wise and convenient purposes, that this relation shall exist, and have made no express exception, the best course, as it seems to me, is to carry into effect their enactments simply and without subtle and nice exceptions to be engrafted thereon, according to our private notions of expediency and justice. Where is a limit to be drawn?

One Judge may limit his view of the hardship being such as to introduce an exception in the act of the case of the sheriff alone; another may include the execution creditor; a third, extend it to the case of an intermediate pledge; and in the end, that great object, clearness and certainty in

the law, will be wholly lost sight of and forgotten.

If I were at liberty to discuss the question as a legislator, I think many good and valid reasons might be given, why, for the prevention of frauds to be committed through the medium of the sheriff by creditors secretly indemnifying the officer by whom the levy is made, the law, as I take it to be at present, ought to remain ; but I disclaim to discuss the question at all on that ground.

I shall, therefore, next proceed to refer to the cases which are reported in our books on this subject ; because, undoubtedly, if I had found this question already settled by a course of decisions, it would have been my duty to acquiesce, even if those decisions did not agree with the view I might take of the legislative provisions on this subject.

Now, on examining these authorities, I think they will be found very strongly to support the view I have before taken.

In *Cooper v. Chitty*, which took place in the year 1756, the Court decided that where there was an act of bankruptcy before the seizure by the sheriff, and after that a commission and assignment, and then subsequently a sale by the sheriff, under the writ, the action of trover was maintainable, although an action of trespass would not lie. Now, there has been much argument on the point whether this decision really turns on a distinction between the actions of trespass and trover, or on the circumstances that the act of seizure was before, and the sale after, the assignment. The Judges, who have decided the cases in our books, seem to me to have adopted the former as the real ground

1837.

GARLAND
v.
CARLISLE.

1837.

 GARLAND
 v.
 CARLISLE.

of that decision. In the earliest case on the subject, that of *Campbell v. Hitchin*, which was decided by Lord Chief Justice De Grey, assisted by Mr. Justice Blackstone, who reported both that case and *Cooper v. Chitty*, I find it thus laid down: “ Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued. So ruled in *Lechmere v. Thorowgood* and in *Cooper v. Chitty*. But, by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff and his vendee, or the plaintiff in the execution.” It may be said that this is only an *obiter dictum*. Even so, it is entitled to much weight, as showing what was considered to be the law in 1772; and this too, when we find that Mr. Justice Blackstone, who concurred in this decision, represents Lord Mansfield as having expressed himself to the like effect in *Cooper v. Chitty*. But that judgment contains another passage to the same effect, to which that observation does not properly apply. The facts of that case, which was an action for money had and received, were these:—On the 9th of March, 1769, the goods were levied and sold; on the 9th of April following, the commission and assignment took place. The act of bankruptcy was in February preceding. There had been previously an action of trover, in which the prior act of bankruptcy had not been proved. The Court say, “ In the present case, *as there was clearly a conversion before the action of trover*, the only question could be on the property;” and this observation was unnecessary to the judgment.

The Court, therefore, clearly decide that the sale by the sheriff before the commission and assignment is a conversion sufficient to maintain trover. From that time till the case of *Potter v. Starkie*, decided first by Mr. Baron Wood, and afterwards confirmed by the Court of Exchequer, there are no decisions to be found in our books. *Potter v. Starkie* was followed by *Lazarus v. Waithman*, in which the so much relied on case of *Bayly v. Bunning* was cited without effect. There Mr. Justice Burrough says, "This point was settled before I knew Westminster Hall." Mr. Justice Richardson says, "The law has been long since settled;" and he adds, afterwards, "In the case of *Lyon v. Lamb* the sheriff sold under an execution before he had any intimation that an act of bankruptcy had been committed, and it was insisted that that circumstance distinguished it from *Cooper v. Chitty*; but the Court of Exchequer held that the property was changed and vested in the assignees by relation, from the time when that act was committed." I cite these observations to show that it can scarcely be proper to say that all these decisions proceed on a mistake as to *Cooper v. Chitty*. It is clear to me that they proceed on what the Judges think to be the only true ground on which *Cooper v. Chitty* can properly stand. *Price v. Hellyar* was the next case, and there also the Court adopted the same distinction. *Dillon v. Langley* is the last decision to which it is necessary to refer. There the point was expressly raised. *Bayly v. Bunning* and *Cole v. Davies* were both cited, and the decision was again, that, under the circumstances, trover was maintainable, though trespass would not lie.

1837.

GARLAND
v.
CARLISLE.

1837.

GARLAND
v.
CARLISLE.

It cannot be disputed, that upon this subject the course of decisions was, for a very long period, uniform in all the courts. *Potter v. Starkie* was a decision of the Court of Exchequer; *Lazarus v. Waithman* and *Price v. Hellyar*, of the Common Pleas; *Dillon v. Langley*, of the King's Bench. These were all decisions in bank. And the same rule has, at all events, been incidentally laid down by Lord Chief Justice De Grey in *Hitchin v. Campbell*. A similar decision was made by Lord Ellenborough in one reported case at *nisi prius*; and, probably, by various other learned Judges, in cases in which it was treated as law too clear to be reported. For we find it so laid down in our text books; and the personal testimony of those who have led, during the last half century, the principal mercantile cases at Guildhall, is to the same effect. If even all these were erroneous, it is one of the strongest instances of the ancient maxim *communis error facit jus*.

This was the state of the authorities when the case of *Balme v. Hutton* was brought before the Court of Exchequer; and surely if any point could be considered as established by an uniform course of decisions, subsequent to *Cooper v. Chitty*, this was that point.

That case, however, was decided otherwise; and, as it is said, on the authority of cases prior to *Cooper v. Chitty*, I will shortly advert to these earlier decisions. The only case of trover against the sheriff is that of *Bayly v. Bunning*. Now, after examining that case with attention, it appears to me not entitled to much weight. The reports of it are clearly, in many respects, incorrect. The observation on which the main reliance is placed, if made

at all by the Court, is not very applicable to the facts as they now are clearly ascertained from the special verdict. It is possible that the real point decided there was, that the mere seizure by the sheriff did not amount to a conversion, and that the Court thought that, although if an ordinary person seized property, and took possession of it, it would be a conversion; yet that in the case of the sheriff, who, in obedience to the writ, took possession of property in which the bankrupt had, at the time, a defeasible interest, such taking would not amount to a conversion. The facts of that case bear no resemblance to that now before your Lordships; for there the goods remained in the sheriff's hands at the time when the action was brought. If we are to pay no attention to the *obiter dicta* in *Hitchin v. Campbell*, why should we give so much weight to an *obiter dictum* in a case remarkably ill reported?

The other cases are all actions of trespass. One of them, *Letchmore v. Thorowgood*, is another instance of bad reporting, and was so treated by almost all the Judges in *Giles v. Grover*; some of them suggesting that to get a clear view of it, you must take a piece from one report and a piece from another, and so make up a sort of patch-work report of the whole. Such authorities are not surely entitled to great weight.

Cole v. Davies is a *nisi prius* decision of Lord Holt; and Lord Mansfield's opinion in *Cooper v. Chitty* is not favourable to the accuracy of that report. As to the case of *Turner v. Felgate*, it really does not appear to me materially to bear on the present question.

1837.

—
GARLAND
v.
CARLISLE.

1837.

GARLAND.
v.
CARLISLE.

Upon the whole, then, I think that if this were *res integra*, I ought to come to the conclusion on the true construction of the various provisions of the bankrupt laws, that as the property vests by relation, from the time of the act of bankruptcy, in the assignees, and not by a fiction of law, but by a positive enactment of the Legislature, for wise reasons; this relation ought to be followed out into all its natural consequences. One of these is, that the sale of this property by the sheriff is, in truth, the sale, not of the bankrupt's property, but of J. S., a stranger; and so a conversion of the property of J. S., for which he can maintain trover.

This view of the case seems to me to be supported by a long and (with the exception only of *Balme v. Hutton*, which has been reversed upon error brought) by an uniform course of decisions. I think, if the opinion I entertain as to the construction of the statutes was doubtful, I should be bound by this current of authority; and, therefore, I have no hesitation, when I find both authority and the true construction of the statutes concur, in answering the first question put by your Lordships in the affirmative.

As to the second question, I apprehend there is no doubt or diversity of opinion. I shall, therefore, content myself with saying, that I am of opinion it should be answered in the affirmative also.

The third question, in the view I take of the first, it is not necessary for me to answer at all. But my opinion, as to that, is, that the sheriff is liable; because he has not obeyed the writ by selling the goods in the ordinary and usual way.

Bosanquet J.—Upon the subject of the first question proposed by your Lordships to the Judges, I expressed my opinion judicially in the case of *Balme v. Hutton*, which has been repeatedly cited in the course of this discussion; and notwithstanding the arguments which I have heard at your Lordships' bar, I am still of opinion that a sheriff is liable to be sued by the assignees in an action of trover under the circumstances supposed by the question. It is agreed on both sides that the general effect of the statutes of the 13 Eliz. c. 7. s. 2. and 21 Jac. 1. c. 19. s. 9. is to vest in the assignees the property of the bankrupt by relation from the act of bankruptcy, and that persons in general who intermeddle with the property between the act of bankruptcy and the assignment are liable to be sued by the assignees in an action of trover. Even a judgment creditor who claims under a writ of execution issued before the act of bankruptcy is liable to be sued by the assignees in that form of action, if the writ has not been executed by a seizure till after the act of bankruptcy, whether the goods were sold under the execution before or after the assignment. The relation thus established by statutory authority, which vests the property in the assignees *ex post facto*, unquestionably produces occasional hardships of considerable magnitude; but it was adopted by the Legislature for the necessary prevention of fraud. Certain inconveniences, which might without much danger be provided for, have from time to time been obviated by particular statutes; but many still do and must remain, unless the great principle of the bankrupt laws, an equal distribution among the creditors, is to be abandoned.

Even at this time the vendee of a sheriff who

1837.

GARLAND
v.
CARLISLE.

purchases *bonâ fide* under an execution executed by seizure after an act of bankruptcy, and completed by sale before the assignment, is nevertheless liable to be sued in trover by the assignees. While adverting to this point, I beg leave to correct a mistake in the opinion which I delivered in *Balme v. Hutton*, where I inadvertently used the word “sale” instead of “seizure ;” saying that the vendee would be liable if an act of bankruptcy appeared to have been committed before the *sale*, when I ought to have said before the *seizure*.

But an exception in favour of the sheriff himself is contended for, not on account of any exemption to be found in the statutes, which are altogether silent with respect to him ; but on account of the nature of his office, by which he is compellable to execute the writs intrusted to him. There is no doubt that a sheriff may, without any fault of his own, at times incur considerable hazard in the discharge of his duty : but it is the peculiar nature of his office which subjects him to this risk. Though he may sometimes suffer from it, much practical advantage accrues to the public from his responsibility. The execution of writs according to the ordinary course of practice is not undertaken by the high sheriff in person, nor by his undersheriff. It is conducted by subordinate officers in inferior situations of life, from whose conduct, unless guarded by strict responsibility, collusion may reasonably be apprehended. Accordingly, the high sheriff takes security from the undersheriff, who takes security from the bailiffs. From the discharge of their duty considerable profits arise, and there is no difficulty in finding persons willing to undertake the risk for the sake of the emolument. There can be

little doubt that if the seizure of goods under a writ of execution by a sheriff's officer after an act of bankruptcy, were sufficient to excuse a sale by the sheriff before assignment, the property which ought to be equally divided among the creditors, would in numberless cases be collusively disposed of to fictitious or favoured creditors, who, when sought for by the assignees would either have absconded or be found insolvent. The relation out of which this responsibility arises is created by statute : and it must be recollected that it is not the only case in which the sheriff is subjected to heavy responsibility in consequence of a statutable duty which he is compellable to execute, and in the execution of which he may be wholly without blame. The sheriff upon making an arrest is bound to discharge the Defendant upon a bail bond, if good bail are tendered ; yet if the bail, who were perfectly solvent when the bail bond was taken, became insolvent in the interval between that time and the time for the appearance in Court of the Defendant, and the Defendant cannot be found, the sheriff must pay the debt. This liability operated with peculiar hardship upon the sheriff before the passing of the Uniformity of Process Act ; when the arrest might have taken place at the end of Trinity term, and the time for appearance not arrive till the beginning of Winter term.

It has been suggested that the sheriff, though not expressly exempted by the terms of any statute, yet is not included within the description of persons in the statute of Elizabeth, against whom the bargain and sale of the commissioners shall be good and effectual to all intents and purposes, because he is not a person " claiming by, from,

1837.


 GARLAND
 v.
 CARLISLE.

1837.
GARLAND
v.
CARLISLE.

“ or under, the bankrupt, by any act had, made, or “ done,” after the bankruptcy. By what right then, it may be asked, does the sheriff claim any right to meddle with the property at all, unless it be by the act of the execution creditor in delivering a writ into his hands; which act of delivery takes place after the bankruptcy? The words of the statute are not confined to acts of the bankrupt himself. It is clear that the execution creditor is barred of any right to require the sheriff to levy for his debt at the time when he delivers the writ to him for that purpose. The sheriff, therefore, can derive no authority from him whose personal interference in the execution would be tortuous, and the undoubted subject of an action of trover. If the effect of the bankrupt statutes is to be confined to persons strictly claiming under the bankrupt, all tort-feasors between the act of bankruptcy and the assignment, who, without any pretence of right under the bankrupt, have interfered with and disposed of the property, will be exempt from liability to answer the assignees in an action of trover, as well as the sheriff. But such a construction would be utterly inconsistent with the received interpretation of the bankrupt laws, and the express provision of the statute of 21 Jac. 1. c. 19. s. 9., that all those laws shall be largely and beneficially construed and expounded for the help and relief of the creditors. Here reasons, independently of authority, appear to me to afford strong ground for holding that the sheriff, as well as all other persons who do any thing between the act of bankruptcy and the assignment, which amounts to a conversion of the bankrupt’s goods, is liable to an action of trover at the suit of the assignees.

But decisions upon the subject, express and numerous, have taken place in all the Courts of Westminster Hall. The Courts of Exchequer, Common Pleas, King's Bench, and Exchequer Chamber, have successively declared that a sheriff under the circumstances stated in your Lordships' first question is liable in an action of trover : and if I thought the question, in the absence of all authority, more doubtful than I consider it to be, I should not feel myself authorised, in opposition to such concurrent authorities, to advise your Lordships that an interpretation adopted in so many judicial determinations, and which is not inconsistent with the language of any statute, ought to be adjudged erroneous.

I forbear to cite the cases which have been so often mentioned.

In addition to the decisions which appear in the printed reports, we learn from Mr. Justice Burrough, who was called to the bar in 1773, that the point was settled before he knew Westminster Hall ; and from Mr. Justice Richardson, whose extensive practice both as a pleader and at the bar are well known, that it had been (in cases) long since settled, and had frequently occurred of late years at *Nisi Prius*.

All the decided cases above alluded to were professedly founded upon the doctrine laid down by Lord Mansfield, in *Cooper v. Chitty*, in 1756, and the practice which had prevailed in consequence of that doctrine. The facts in *Cooper v. Chitty* certainly were not identical with those stated in your Lordship's question ; but the practice which obtained, and the decisions which followed that

1837.

GARLAND
v.
CARLISLE.

1387.

GARLAND

v.

CARLISLE.

case, have been considered as necessary consequences of the principles therein promulgated.

Lord Mansfield in that case, after stating that in an action of trover two things are necessary to be proved—property in the Plaintiff, and a wrongful conversion by the Defendant—proceeds distinctly, perhaps more distinctly than had before been done, to declare that the property of a bankrupt vests in the assignees at and from the act of bankruptcy by relation ; that the sale by the commissioners is good against all persons who claim by, from, or under, the bankrupt after the act of bankruptcy, and against all executions not served or executed before the act of bankruptcy ; that dispositions by process of law are put upon the same footing with dispositions by the party ; to be valid they must be completed before the act of bankruptcy ; that the sheriff acts at his peril, and is answerable for any mistake ; that, although he may not be liable to answer as a trespasser for laying his hands upon the goods by seizure, yet that the taking is not lawful, because the goods are the property of a third person ; but is nevertheless so far excusable that the sheriff shall not be made a trespasser by relation ; and that if the sheriff convert the goods by a wrongful sale, he is liable to be sued in trover as well as any other person. He certainly notices, and in some degree relies upon, the conversion by sale having taken place after the commission and assignment ; but if, according to Lord Mansfield, “ dispositions by law are put upon the same foot as “ dispositions by the party ;” if the vender of the goods between the act of bankruptcy and assignment is liable to be sued by the assignees in trover for wrongful conversion ; if the sheriff act at his peril,

and is answerable for a mistake; and if trover be the proper remedy where the sheriff is guilty of a conversion; it seems to follow, that the sheriff who sells during the interval between the act of bankruptcy and assignment must be deemed guilty of a conversion, and be liable to an action of trover, unless an exemption founded on statute or judicial authority can be established in his favour. The sale in *Cooper v. Chitty* having in fact taken place after the assignment, it was natural that Lord Mansfield, after having stated the general principles to show that the excusable character of the seizure did not, as had been contended, justify a sale, should advert to the actual period of sale, which in the case before him put the question of conversion beyond all doubt. This he might think the more proper, as the special verdict in *Bayly v. Bunning* was not before him, and that case had been cited to show that the sheriff who had seized and detained goods between the act of bankruptcy and the assignment was not liable in an action of trover; and also to show that the *dictum* of Lord Holt, in *Cole v. Davies*, which had been cited, whatever he might think of it, was not applicable to the case in judgment. If the inferences which have been drawn from the case of *Cooper v. Chitty* depend upon the particular circumstances, and not upon the principles which are found in it, that case is not an authority for the practice or the decisions which have followed it; and it has been argued, that the cases which preceded it are adverse to the practice and decisions which have been founded upon it.

The cases preceding it, which have been cited, are six in number: of the cases of *Turner v. Fel-*

1837.

GARLAND
v.
CARLISLE.

1837.
GARLAND
v.
CARLISLE.

gate, and *Letchmore v. Thorowgood*, it is sufficient to say that they were actions of trespass, and can decide nothing with respect to the sheriff's liability in trover. *Letchmore v. Toplady* was indeed an action of trover, but the only question there was, whether the acquittal in a preceding action (*Letchmore v. Thorowgood*), which had been brought in trespass for seizing and carrying away the same goods, the causes of action being averred to be the same, was a bar to a second action in trover* for the same cause; and, it having been determined that it was a bar, the liability of the Defendant in trover, under the circumstances of the case, did not come in question.

Thompson v. Phillips was an action of assumpsit, brought by assignees against an execution creditor, for money received of the sheriff under an execution, levied between the act of bankruptcy and assignment; in which the Court held that the assignees ought not to have sued in assumpsit for the money, but in trover for the goods. Whether the action of trover should have been brought against the sheriff who levied, or against the creditor who received the money, but who does not appear to have interfered with the goods, the Court does not say. If trover for the goods could be maintained against the execution creditor, it would hardly be contended, at the present day, that he might not be sued, for the proceeds, in an action of money had and received.

Bayley v. Bunning was an action of trover against the sheriff, who seized the goods after an act of bankruptcy and before the assignment, un-

* See the pleadings, 2 Vent. 156.

der a writ which was antedated, and refused to deliver them after demand made. The only question in that case was, whether the taking, that is the seizure under the writ, was lawful. The sheriff detained the goods but did not sell them. After the assignment, the special verdict finds a demand and refusal; which, it is well known, do not amount to a conversion: consequently, unless the seizure itself was a conversion, the sheriff could not be liable in trover. The special verdict stated, that if the taking was lawful, the Jury found for the Defendant, if not, for the Plaintiff; and the Court held that the issue was found for the Defendant; for the taking, by virtue of the writ, was in their opinion lawful. This is exactly the doctrine of Lord Mansfield. The mere taking possession by the sheriff is excusable, if he do no more; but if he proceed to sell or otherwise to dispose of the goods, it is a conversion, for which he is answerable in trover: and this is consistent with the observation often made, that the sheriff may apply to the Court for time to return the writ, which implies that, having taken possession of the goods under the writ, his merely keeping them in *custodiâ legis* till the return of the writ, for the purpose of ascertaining to whom the goods belong, would not be deemed a conversion. It also agrees with the opinion delivered by Lord Ellenborough, in *Wyatt v. Blades* *, which was an action of trover against a sheriff for seizing in execution, and carrying to a broker, goods of a bankrupt, after a secret act of bankruptcy, but before the commission, which goods continued at the broker's unsold,

1837.

 GARLAND
 v.
 CARLISLE.

* 3 Campb. 396.

1837.

GARLAND

v.
CARLISLE.

in consequence of a notice to the sheriff not to sell. His Lordship says, “Had the goods not been removed, it would have been difficult to say there was any conversion; but I think the removal of them, after an act of bankruptcy, is a sufficient conversion to maintain the action, notwithstanding the subsequent notice.” There are many other authorities, — *e. g.* *Solomon v. Dawes*, 1 Esp. N.P. C. 83.; *Green v. Dunn*, 3 Camp. 215., note; *Bulstrode*, 312.; Dict. per *Coke* C. J., 2 B. & P. 464.; Dict. per *Chambre* J., 2 B. & B. 449., — to show that reasonable hesitation, in a doubtful case, to deliver goods upon demand, does not amount to a conversion.

If the case of *Bayly v. Bunning* be urged as an authority for holding any imputed conversion by the sheriff, except the seizure, excusable, it may be answered, that nothing but the seizure occurred in that case before the assignment; and it is not contended that an act of the sheriff amounting to a clear conversion, such as a sale after the commission and assignment, would not subject him to an action of trover.

The only remaining authority, prior to that of *Cooper v. Chitty*, is *Cole v. Davies**, which was an action, not against the sheriff, but against assignees of bankrupt, in which Lord Holt is reported to have said, at *Nisi Prius*, that if the sheriff seizes and sells goods of a bankrupt, after the bankruptcy and before commission, the assignees may maintain trover against the vendee, but no action lies against the sheriff. This gratuitous observation, ascribed to Lord Holt at *Nisi Prius*, was entirely

* 1 Ld. Raym. 724.

beside the cause in hand, which was an action against assignees, apparently brought to recover from them goods sold to the Plaintiff, under an execution before the bankruptcy, and collusively left in the bankrupt's possession. Whether the observation be or not correctly reported, it is not supported by any preceding known authority, and it was treated by Lord Mansfield as a loose note of what was said *obiter*, having a manifest reference to *Bayly v. Bunning*, which, it has been seen, does not support it; that case having turned altogether upon the seizure under the writ, no sale, or other disposal of the goods, having taken place before the commission.

The *dicta* of many Judges, commencing as early as 1772, and several passages from practical writers, have been referred to, for the purpose of showing the prevailing impression in Westminster Hall, soon after *Cooper v. Chitty*, in 1756, and long prior to the case of *Potter v. Starkie*, in 1807; but unless it can be clearly established, from an examination of the authorities before *Cooper v. Chitty*, that they are at variance with those which have since taken place, I humbly apprehend that the latter decisions, considering their number and the weight of authority which they carry with them, ought to prevail. Upon your Lordships' first question, therefore, I am humbly of opinion that a sheriff seizing and selling goods under a *fiery facias* was, in December 1824, liable in an action of trover, brought by the assignees of the Defendant, in the action in which the *fiery facias* was issued, such Defendant having committed an act of bankruptcy before the seizing and selling of the goods, but no commission having issued until after such sale.

1837.

GARLAND
D.
CARLISLE.

1837.


GARLAND
v.
CARLISLE.

Your Lordships have been pleased to inquire, secondly, if the first question be answered in the affirmative, then, whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the Plaintiff and the Defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage. In answer to which second question, I am humbly of opinion that he was liable.

If, by proceeding to a sale in the ordinary course of executing the writ, he would be guilty of a conversion, he would not be less guilty in allowing a proceeding to take place between other persons, by which the goods seized, under the writ, were tortuously disposed of, and taking a profit in the shape of poundage upon such proceeding.

Your Lordships inquire, thirdly, if the first question be answered in the negative, then, whether such sheriff was liable, if, instead of selling the goods, he had concurred in an arrangement between the Plaintiff and the Defendant in the action, under which the goods were delivered to the Plaintiff in the action, in satisfaction of his demand, the sheriff receiving his poundage. Upon this third question, I am humbly of opinion that however excusable the sheriff may have been in seizing and selling the goods between the act of bankruptcy and the assignment, in the ordinary course of his supposed duty, yet, that by concurring in an arrangement for the delivery to the Plaintiff of the goods in his custody under the writ, in a manner not authorised by the writ, he loses every right to avail himself of the character of sheriff, and subjects himself to answer for any conversion, in the

same manner as those to whose wrongful act he has made himself a party.

A removal of goods for the purpose of sale under the writ, though no sale actually take place, is a conversion, according to the doctrine of Lord Ellenborough in *Wyatt v. Blades*, before referred to. Consequently, an actual delivery of the goods to the execution creditor in satisfaction of his debt without sale, if wrongful, must, *à fortiori*, amount to a conversion.

A writ of *feri facias* in December, 1824, would, according to the law and practice then in force, have been tested of the preceding Michaelmas term, and returnable in Hilary term following; by which the sheriff would be commanded to cause to be made of the Defendant's goods a certain sum of money for debt and costs, and to have that money before the Court at the return day, to render to the Plaintiff, and to have then there that writ. If, instead of pursuing the directions of the writ, and levying the money, the sheriff, after taking the goods of the Defendant, delivered them, or voluntarily allowed them to be delivered, without sale, to the Plaintiff in the execution, he took upon himself to dispose of the goods in a manner not authorised by law. The receipt of the poundage, which he might have lawfully taken upon a levy of the money, shows the connection of the sheriff with the transaction, but it cannot have the effect of converting an irregular and extra official disposal of the goods into a regular levy of debt and costs by virtue of the writ. It is laid down in *Langdon v. Wallis* *, that the law requires of sheriffs a strict

1837.

GARLAND
v.
CARLISLE.

* Lutw. 181.

1837.

GARLAND
v.
CARLISLE.

execution and observance of the King's writ directed to them; wherefore it was adjudged in *Waller v. Weedale's* case*, that if the sheriff levy goods upon a *feri facias*, and afterwards pay the Plaintiff with his own proper money, still he cannot detain the goods; and, for the same reason, it had also been adjudged, that a sheriff cannot deliver the goods taken by him upon a *feri facias*, to the Plaintiff in satisfaction of his debt; for which last position was cited, as in point, *Thompson v. Clerk*†, and *Beaty v. Sampson*.‡

So Holt C. J. says, in *Pullen v. Purbeck* §, upon an *elegit* the sheriff may deliver goods to the party; but not upon *feri facias*. And the practical books, Dalton, Impey, and Tidd, repeat the same rule.

In departing from the official course, the sheriff acts at his peril: and if the goods wrongfully delivered to the Plaintiff in the execution, turn out in the event to have been the goods of the assignees, the sheriff, like every other person, must be answerable in trover for his wrongful conversion; though he may, on account of the nature of his office, have been excusable for the act of taking possession. For these reasons I am humbly of opinion that the sheriff was liable, under the circumstances stated in your Lordships' third question, as well as under those stated in the first and second.

Bolland B.—My Lords. In offering my reasons to your Lordships for answering the first question proposed to the Judges in the negative, it

* Noy, 107.

† 2 Vent. 93.

† Cro. Eliz. 504. (Noy, 55. S. C.)

§ 1 Ld. Raym. 346.

will be obvious to your Lordships, that as my view of this matter remains unchanged, it will be difficult for me to avoid in some degree following the same train of argument, I adopted in the Court of Exchequer Chamber, in delivering my opinion upon the writ of error brought on the judgment of the Court of Common Pleas upon the special verdict found upon the trial of this cause. As the opinions of the Judges in the Court of Exchequer Chamber are fully given in the books of reports, I shall consider it my duty to compress into as small a compass as possible the observations I have to submit, and not to occupy more of the time of this house than the importance of the question necessarily requires. The claim of a Plaintiff in an action against a sheriff rests upon a statutory provision, by which the property of a bankrupt at the time of his bankruptcy is subjected to the operation of a commission against him. The case of *Balme v. Hutton* was decided in Michaelmas term, in the second year of the late King, in the Court of which I am a member, after a most anxious consideration of all the cases that are to be found in the books that are authorities upon this question. An elaborate judgment was delivered by the learned Lord Chief Baron, as the unanimous opinion of the Court; and I might rely upon that decision as governing the present question, did I not know that a great difference of opinion exists in the minds of the Judges respecting it.

The late stat. 6 Geo. 4. c. 16., by which the law of bankruptcy is now regulated, though it differs in some parts from former acts, furnishes no ground for a difference of construction with reference to the question before me. The cases, therefore, that

1837.

GARLAND
v.
CARLISLE.

1837.


GARLAND
v.
CARLISLE.

have arisen on former statutes are to be looked upon as authorities.

A sheriff is a ministerial officer: he acts in the execution of his duty, in obedience to a command of one of the superior Courts of Justice: the proceeding is not for his benefit; it is in the King's name: the property at the time of the seizure is in the bankrupt.

Such being the state of things, it does appear to me very great injustice to make this public officer a wrong doer, in consequence of subsequent events, over which he has no control whatever. It is only by relation therefore that he can be made so.

Let me examine the law as to the doctrine of relation. It is laid down in 3 Coke, 29. b., that "no relation should make that tortuous which was lawful, for relations were fictions of law which shall never do wrong." Ventris J. says, "Relations shall not do wrong to strangers; they are fictions in law which are always accompanied with equity."* In speaking of the relation of the act of bankruptcy, Mansfield C. J. observes, "It is in all cases extremely hard, in some cases extremely shocking, and is not to be carried farther than we are compelled." If the sheriff acts honestly, is it not enabling relation to do wrong to extend it to this public officer? and shall this injustice be done to benefit those to whom a degree of negligence may be imputed in not issuing a commission immediately after the act of bankruptcy was committed? But it is said, this hardship upon a sheriff cannot operate in his favour, and instances are adduced in which the law holds him answerable

* 2 Vent. 200.



